LIBRARY
SUPREME COURT, U.S.

FILED
MAR 3 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

ATLANTIC MUTUAL INSURANCE COMPANY, FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *ET AL.*,

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC.

LEONARD J. MATTESON,
Counsel for Respondents, Farr Sugar Corporation and American Spirits, Inc.

BIGHAM, ENGLAR, JONES & HOUSTON,
OSCAR R. HOUSTON,
RICHARD F. SHAW,
JULIAN S. GRAVELY, JR.,
Of Counsel.

INDEX.

	PAGE
Brief for Respondents Farr Sugar Corporation and American Spirits, Inc.	1
Opinions Below	1
Jurisdiction	1
Statutes Involved	2
The Question Presented	2
Statement	5
The Opinion of the Court of Appeals	7
Argument	8
Preliminary	8
I—The Both-to-Blame clause is not consensual	8
(a) The cargo owners are faced with a united front of all steamship owners acting in concert seeking to impose the clause upon them	9
(b) To permit enforcement of the Both-to-Blame clause would be to allow the shipowners to become legislators and to compel cargo owners to surrender their rights against a negligent non-carrier as no statute has done	10
II—The Both-to-Blame clause is not supported by the Harter Act or the Carriage of Goods by Sea Act and is contrary to public policy	11
(a) The right of the innocent cargo owner to a full recovery from the non-carrier is clear	11

PAGE

(b) The right of the non-carrier against the carrier is for a division of the damages of the respective vessel owners arising from the collision and the carrier's liability corresponds 12

(c) The claim of the carrier against the cargo owner under the Both-to-Blame clause 14

(d) There is no recovery by cargo against the carrier and no statutory scheme has been infringed 15

(e) No division of damages between the vessel owners should be permitted to affect the cargo owner's right to a full recovery from the negligent non-carrier 17

(f) The Both-to-Blame clause is of necessity an indemnity, not an immunity, clause 21

(g) The demand of the carrier on the cargo owners for an indemnity against the carrier's tort liability to another is unreasonable 22

(h) The *Jason* clause is not an indemnity clause 24

(i) There is no policy indicated in the Harter Act which supports the Both-to-Blame clause 26

(j) The Carriage of Goods by Sea Act goes no further 29

(k) The Both-to-Blame clause violates the stated purposes of the Carriage of Goods by Sea Act 33

PAGE

(l) The Both-to-Blame clause is an attempt by shipowners to secure the distribution of cargo losses accomplished in certain foreign countries by the Brussels Collision Convention, 1910, on principles rejected here, rather than in accord with any principle adopted by the Acts. Any such change is for Congress, not the shipowners, to make 36

III—The Both-to-Blame clause is contrary to the specific provisions of Section 4(3) of the Carriage of Goods by Sea Act and is therefore unenforceable 39

Conclusion 44

Comment on Brief for Respondent Belgian Overseas Transport, S. A., Owner of M. V. "Esso Belgium" 45

(a) The Brief for the "Esso Belgium" makes it abundantly clear that the objective of the Both-to-Blame clause is to obtain for shipowners the substantial equivalent of the limitation of cargo rights obtained in foreign countries through the Brussels Collision Convention 45

(b) The assertion that a carrier may contract "as he pleases with a cargo owner, provided the essential duties owed to the cargo owner by the carrier are not reduced by the contract" is clearly fallacious 47

Appendix 51

Harter Act, 1893 51

Carriage of Goods by Sea Act, 1936 53

PAGE

Excerpt from Report of Hearing Before the Committee on Commerce, United States Senate, 74th Congress, 1st Session, on S. 1152, A Bill Relating to Carriage of Goods by Sea, May 10, 1935, pp. 51-59 64

TABLE OF CASES CITED:

Aktieselskabet Cuzco v. *The Sucarseco* (1935), 294 U. S. 394 ..... 13, 25

American Mut. L. Ins. Co. v. *Matthews*, 2 Cir., 182 F. 2d 322 ..... 22, 28

Ansaldo San Georgio I v. *Rheinstrom Co.*, 294 U. S. 494 ..... 9, 22

Atlas, The (1876), 93 U. S. 302 ..... 2, 11, 18, 20, 23, 37, 37n, 46

Carib Prince, The, 170 U. S. 655 27

Catherine, The (1854), 17 How. 169 ..... 12, 27

Chattahoochee, The (1899), 173 U. S. 540, 2, 3, 12, 16, 18, 20n, 26, 27, 28

Delaware, The (1896), 161 U. S. 459 ..... 2, 26

Drumlanrig, The (1910), Prob. 249 ..... 37n

Erie R. R. Co. v. *Erie & Western Trans. Co.* (1907), 204 U. S. 220 ..... 13, 34n

Express Co. v. *Caldwell*, 21 Wall. 264 22

Geo. W. Roby, The, 6 Cir., 111 Fed. 601, cert. den. 183 U. S. 699 ..... 17, 27

Great Lakes Transit Corp. v. *Interstate S. S. Co.*, 301 U. S. 646 15

Halcyon Lines v. *Haenn Ship Ceiling Corp.*, Nos. 62 and 197, October Term, 1951, decided January 14, 1952 ..... 18, 38

PAGE

Inman v. *So. Car. Rwy. Co.*, 129 U. S. 128 ..... 35n
Irrawaddy, The, 171 U. S. 187 27

Jason, The, 2 Cir., 178 Fed. 414 ..... 24, 25
Jason, The, 225 U. S. 32 24

Kensington, The, 183 U. S. 263 ..... 22, 27

Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397 .. 9, 22

May v. *Hamburg &c.*, 290 U. S. 333 27
Milan, The (1861), Lush Adm. 388 ..... 36, 36n, 37, 46

New York, 175 U. S. 187 ..... 34n
North Star, The (1882), 106 U. S. 17 2

Pan-Am T. & C. Corp. v. *The Campfire*, 64 F. Supp. 179, affd. 2 Cir., 156 F. (2d) 603, cert. den. 329 U. S. 774 ..... 8n

Railroad Co. v. *Pratt*, 22 Wall. 123 22
Ralli v. *Troop*, 157 U. S. 386 24

Stoomvaart etc. v. *P. & O. Navigation Co.* (1882), 7 App. Cas. 795 ..... 37n
Straus & Co. v. *Canadian Pacific Ry. Co.*, 254 N. Y. 407 9

Toluma, The, 2 Cir., 72 F. 2d 690, affirmed *sub nomine Aktieselskabet Cuzco* v. *The Sucarseco* (1935), 294 U. S. 394 25
Turret Crown, The, 2 Cir., 297 Fed. 766, cert. den. 264 U. S. 591 ..... 35n

Wildcroft, The, 201 U. S. 378 27

Other Authorities Cited:

PAGE

A. L. I. Restatement of the Law, Torts:
Section 875 12
Section 880 12

Brussels Collision Convention, 1910 .....20, 36, 37, 45, 46

Brussels Convention, 1924 40

Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. c. 229, 1207, 46 U. S. C., 1300 *et seq.*),
2, 3, 4, 7, 8n, 15, 16, 22, 33, 34, 35, 36, 38, 39, 41, 46
Section 1 (46 U. S. C. 1301) 53
Section 2 (46 U. S. C. 1302) 54
Section 3 (46 U. S. C. 1303) 54, 55, 56
Section 3(1) (46 U. S. C. 1303) 29
Section 3(8) (46 U. S. C. 1303) 35, 35n
Section 4 (46 U. S. C. 1304) 57, 58, 59
Section 4(3) (46 U. S. C. 1304),
7, 19, 22, 25, 29, 30, 35, 39, 40, 41, 42, 43
Section 4(6) 41
Section 5 (46 U. S. C. 1305) 25n, 35, 59, 60
Section 6 (46 U. S. C. 1306) 35, 60
Section 7 (46 U. S. C. 1307) 60
Section 8 (46 U. S. C. 1308) 61
Section 9 (46 U. S. C. 1309) 61
Section 10 (Repealed by Transportation Act, 1940, 54 Stat. 929) 61
Section 11 (46 U. S. C. 1310) 61
Section 12 (46 U. S. C. 1311) 62
Section 13 (46 U. S. C. 1312) 62
Section 14 (46 U. S. C. 1313) 62, 63
Section 15 (46 U. S. C. 1314) 63
Section 16 (46 U. S. C. 1315) 63

Comgdon on General Average, 2nd Ed. 167 24

PAGE

English Maritime Conventions Act, 1911 37

Gregory, Contribution Among Tort-Feasors, A Defense, 54 Harv. L. Rev. 1170 ..... 19n

Hague Rules, 1922 39

Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., 190-195) 2, 4, 11, 12, 13, 14, 15n, 16, 19, 22, 24, 25, 26, 27, 29, 38

Section 1 (46 U. S. Code, Sec. 190) 51

Section 2 (46 U. S. Code, Sec. 191) 51

Section 3 (46 U. S. Code, Sec. 192), 26, 27, 28, 36, 51, 52

Section 4 (46 U. S. Code, Sec. 193) 52

Section 5 (46 U. S. Code, Sec. 194) 52

Section 6 (46 U. S. Code, Sec. 195) 52

Section 7 (46 U. S. Code, Sec. 196) 52

Harvard Law Review, December 1951, Vol. 65, pp. 340-341 ..... 38n

Hearings Before Committee on Commerce, U. S. Senate, 74 Cong., 1st Sess. on S. 1152:

Pages 51-59 .....32, 64-77

Pages 53, 54 .....30, 31

Hearings Before Committee on Merchant Marine and Fisheries, House of Representatives, 74 Cong., 2d Session, on S. 1152, January 26, 1936 32

International Maritime Committee, Bulletin No. 57, London Conference, 1922, p. 480 40

International Maritime Committee, London Conference, October 11, 1922, Bulletin No. 57, pp. 476-479 ..... 25n

James, Contribution Among Tort-Feasors, A Pragmatic Criticism, 54 Harv. L. Rev. 1156 ..... 19n

Judicature Act of 1873 36

PAGE

Limited Liability Act (R. S. §4281, *et seq.* as amended, 46 U. S. C. 181, *et seq.*) 34

Longshoremen's and Harbor Workers' Compensation Act 18

Marsden on Marine Collisions, 9th Ed. 1934, p. 136... 37n

Report of 18th Conference, The International Law Association, pp. 178-200, Everett P. Wheeler....27, 28

Report of Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Congress, January 10-14, 1938:
2nd Session:
Page 14 29
Pages 111-113 ..... 49n
Pages 158-159 ..... 49n
Page 408 .....20, 20n
3rd Session, p. 72, Charles C. Burlingham 28

Report of House Committee No. 2218 on S. 1152 33

Roscoe on Damages in Marine Collisions, 3rd Ed., pp. 20, 21 .....37n

Senate Report No. 742 on S. 1152 33

Stanford Law Review, February 1952, Vol. 4, No. 2, pp. 286, 288 .....20n, 25

Temperley's Carriage of Goods by Sea Act, 4th Ed.:
Pages 64-65 .....35, 42
Pages 66-67..... 42

W. S. A. Press Release, Apr. 18, 1942, N. Y. Times, Apr. 19, 1942, p. 8 9

24 Congressional Record:
Page 148 26
Pages 171-173 26

28 U. S. C. 1254(1) 1

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1951.

No. 450.

UNITED STATES OF AMERICA,

Petitioner,

—against—

ATLANTIC MUTUAL INSURANCE COMPANY,[1] FARR SUGAR CORPORATION, AMERICAN SPIRITS, INC., *et al.*,

Respondents.

BRIEF FOR RESPONDENTS FARR SUGAR CORPORATION AND AMERICAN SPIRITS, INC.

Opinions Below.

The opinion of the District Court for the Southern District of New York (R. 101) is reported at 90 F. Supp. 836. The opinion of the Court of Appeals for the Second Circuit (R. 135) is reported at 191 F. 2d 370.

Jurisdiction.

The judgment of the Court of Appeals for the Second Circuit was entered on August 31, 1951 (R. 148). The jurisdiction of this Court is under 28 U. S. C. 1254(1).

---

[1] The incorporation in the captions of the Petition and of Petitioner's Brief of the name of Atlantic Mutual Insurance Company as a respondent is an error. Neither that company, nor any insurance company, has been proceeded against by the United States of America in this litigation or is a party with respect to the question in dispute.

Statutes Involved.

The pertinent portions of the Harter Act (Act of February 13, 1893, 27 Stat. 445, 46 U. S. C., 190-195) and of the Carriage of Goods by Sea Act (Act of April 16, 1936, 49 Stat. 1207, 46 U. S. C., 1300 *et seq.*) are set forth in the Appendix to this brief, *infra*, pages 51-63.

The Question Presented:

The Harter Act (1893) and the Carriage of Goods by Sea Act (1936) provided that common carriers of goods by sea, unlike other common carriers, should no longer be liable to the owners of the cargo carried for damage resulting from faults or errors of navigation.

These acts did not deprive the cargo owner of the right which he has to recover his damages in full from another vessel or owner proved negligent. *The Atlas* (1876), 93 U. S. 302, 317.

Neither did they affect the liability of one shipowner to another. *The Delaware* (1896), 161 U. S. 459, 474.

As between vessel owners in a case of collision when both are to blame, the rule in admiralty is that the damages suffered by them respectively are divided equally between them, the one suffering the least being decreed to pay to the other one-half of the difference between their respective losses sustained. *The North Star* (1882), 106 U. S. 17, 20.

In the case of *The Chattahoochee* (1899), 173 U. S. 540, 552-555, this Court held that, on establishing its right to such a division of damages, a non-carrier could include in its claim for its damages resulting from the collision the amounts paid or payable by it to the owners of cargo on the carrying vessel. This Court there rejected the contention that to permit the non-carrier to do so would result in a liability of the carrier for cargo damage contrary to the provisions of the Harter Act.

The principles of these decisions apply equally to cases under the Carriage of Goods by Sea Act.

The correctness of these decisions is not here in question for the parties have stipulated their respective rights and liabilities up to the point in dispute in accordance therewith (Pet. Brf. 42, fn. 24).

The carrier describes the result of the decision in *The Chattahoochee, supra*, as "anomalous" because it has the practical effect of shifting to him the burden of one-half the cargo damage, albeit in the form of a liability to the non-carrier for damage sustained by the non-carrier as a result of the collision. The carrier seeks to avoid this result by demanding from the cargo owner an indemnity against his liability to the non-carrier. It would thus compel the innocent cargo owner to give up to the carrier when negligent one-half of the recovery to which the cargo owner is unquestionably entitled from the non-carrier under our law.

The question presented is as to the validity of the so-called Both-to-Blame clause present in the bills of lading in this case (Par. 9, R. 58) through which the carrier seeks to accomplish this result.

The Both-to-Blame clause made its first appearance in ocean bills of lading about 1935, some 36 years after the decision in *The Chattahoochee, supra*, and is now in general use by practically all common carriers by sea to and from ports of the United States. Since the clause has never been enforced no established relationship is disturbed by the action of the Court of Appeals in declaring it void and unenforceable.

The Both-to-Blame clause would require the cargo owner suffering loss by reason of a collision for which both the carrier and another vessel owner are to blame to indemnify the carrier against all loss or liability to the other or non-carrying ship or owner in so far as such loss or liability represents damage suffered by the cargo owner recovered from the non-carrier and set-off, recouped or recovered by the non-carrier against the carrying ship or

owner as part of its claim against the carrying ship or carrier.[2]

Concededly the Both-to-Blame clause would have been invalid prior to the Harter Act. No support for the clause is suggested other than an alleged change in public policy said to have been brought about by that Act and continued by the Carriage of Goods by Sea Act.

The question is not, therefore, as stated by petitioner's counsel, whether the clause is prohibited by those Acts or contravenes the public policy expressed in those Acts. On the contrary, the question is whether any policy or authority can be found in those Acts which would justify the exaction of this clause from the cargo owner.

The precise questions presented to this Court are therefore:

> May a common carrier of goods by sea, by bill of lading clause, force a cargo owner to indemnify the carrier against the carrier's tort liability to another vessel owner, or force the cargo owner to relinquish to the negligent carrier one-half of the recovery to which the cargo owner is entitled from a non-carrier?
>
> Is the Both-to-Blame clause validated by any change of public policy brought about by the Harter Act and the Carriage of Goods by Sea Act?

---

[2] The exact text of the clause is as follows:

"9. If the ship comes into collision with another ship as a result of the negligence of the other ship and any act, neglect or default of the Master, mariner, pilot or the servants of the Carrier in the navigation or in the management of the ship, the owners of the goods carried hereunder will indemnify the Carrier against all loss or liability to the other or non-carrying ship or her owners in so far as such loss or liability represents loss of, or damage to, or any claim whatsoever of the owners of said goods, paid or payable by the other or non-carrying ship or her owners to the owners of said goods and set-off, recouped or recovered by the other or non-carrying ship or her owners as part of their claim against the carrying ship or Carrier" (R. 58).

Statement.

There are two actions, consolidated in the interlocutory decree for convenience. The United States filed its libel as owner of the S. S. "Nathaniel Bacon" and bailee of the cargo laden thereon to recover the damages sustained by both as the result of a collision from the M. V. "Esso Belgium" (R. 7). Subsequently certain insurance companies as subrogees of some of the cargo owners intervened claiming the recoveries to which their assureds would otherwise have been entitled.

The owner of the "Esso Belgium" filed a cross-libel against the United States for its damages resulting from the collision (R. 28) and by amendment claimed as damages any sums which it might be required to pay on account of damage to cargo on the "Nathaniel Bacon" (R. 35). In the cross-action, the United States impleaded all the owners of cargo, insured or otherwise,[3] on the "Nathaniel Bacon" seeking indemnity pursuant to the Both-to-Blame clause (R. 40). Two of the cargo owners, Farr Sugar Corporation and American Spirits, Inc., filed an answer denying the validity of the clause.

It was stipulated that the collision occurred through negligence on the part of both vessels, that no loss sustained by any party was the result of any act, fault or neglect of the shippers, consignees, owners or insurers of cargo, and that the "Nathaniel Bacon" was properly stowed and seaworthy (R. 72). It was further stipulated that the two answering cargo owners sustained certain damage (R. 73), that their insurers were subrogated to their rights (R. 74), and that these insurers were entitled to recover the damages of the cargo owners insured by them in full

---

[3] 27 of the 112 cargo owners impleaded are not assureds of the intervening insurers and so far as appears were uninsured. As to these the United States is still libellant in its representative capacity, although it is also in the position of suing them for an indemnity under its petition.

from the "Esso Belgium" (R. 75). It was further stipulated that upon payment of these damages, the owner of the "Esso Belgium" was entitled to offset, recoup or recover a part thereof[4] from the United States, as owner of the "Nathaniel Bacon" (R. 75-76).

The rights of other parties to the litigation were agreed to be controlled by the disposition of the claims of the United States against Farr and American Spirits (R. 77-78).

It was also stipulated that the United States (War Shipping Administration) in the carriage of goods on the "Nathaniel Bacon" and the issuance of the bills of lading was engaged as a common carrier in the commercial carriage of merchandise by sea for hire (R. 77).

Upon a trial of the single issue the District Court held the Both-to-Blame clause valid (R. 101). An interlocutory decree was thereupon entered (R. 113) awarding the intervening cargo insurers their full legal damages in the action against the "Esso Belgium" (R. 119). The decree further provided that the sums determined to be so recoverable be treated as a part of the damages of the owner of the "Esso Belgium" and that, the damages of the respective vessel owners having been determined, the United States should have a decree against the owner of the "Esso Belgium" for the amount by which two-thirds of the damages of the United States exceeds one-third of the damages of the owner of the "Esso Belgium", or vice versa (R. 120). The United States was awarded an indemnity against the cargo owners as prayed for (R. 120).

Upon appeal the Court of Appeals reversed and directed that the provision for an indemnity be eliminated from the interlocutory decree which stands in all other particulars (R. 135-148).

---

[4] One-third in fact, since the vessel owners had reached an agreement on division of the damages between them on the basis of one-third-two-thirds instead of the usual equal division.

The Opinion of the Court of Appeals.

The Court of Appeals held that to permit the shipowner to overturn settled principles of our law in order to close an alleged gap in legislative benefits, and to require such a definite relinquishment of the rights given to cargo under our law, through the medium of a bill of lading clause lacking the necessary elements of a consensual agreement (R. 139-140), would be to allow the carriers to be legislators beyond present justification (R. 137). Any such change in the American rule is for Congress rather than for the courts and no such clause can be found reasonable without clear and direct authorization of law (R. 140). The American policy is quite clear and against the Both-to-Blame clause. This attempt to push the policy of legislation to a point where it has definitely not gone is in itself legislation (R. 145).

The Court of Appeals did not decide whether the Both-to-Blame clause violates specific provisions of the Carriage of Goods by Sea Act but found in those provisions additional evidence that Congress meant to grant the carriers only whatever benefits were explicitly set out in the legislation (R. 146).

The opinion of the Court of Appeals is, we submit, sound and well reasoned. Our argument will not only support this proposition but will add that the clause contravenes the specific policy and provisions of the Carriage of Goods by Sea Act, and in particular the provisions of Section 4(3).

ARGUMENT.

Preliminary.

The relationship of the parties is that of common carrier to cargo owner in the ordinary commercial carriage of merchandise by sea (R. 77). Although in this case the carrier was the War Shipping Administration, that Administration merely followed the practice of private commercial carriers in including the Both-to-Blame clause in its bills of lading.[5] In other pending cases the United States through other agencies is heavily interested as a cargo owner. In normal times the interests of the United States are principally as cargo owner and not as carrier.

It appears that the United States as carrier is insured against the liability here involved (R. 81). It was represented in the courts below by counsel for its insurers who also appear on the brief here.

I.

The Both-to-Blame clause is not consensual.

This Court has always recognized that the carrier and his customer do not stand on a footing of equality. The individual customer has no real freedom of choice. He has no alternative but to accept the bill of lading tendered or abandon his business. Therefore, this Court has not permitted carriers to insert unreasonable or improper stip-

[5] For WSA bill of lading clause declared to violate the provisions of the Carriage of Goods by Sea Act and to be "opposed to public policy" and therefore void, see *Pan-Am T. & C. Corp. v. The Campfire*, 64 F. Supp. 179, 183, affd. 2 Cir., 156 F. (2d) 603, cert. den. 329 U. S. 774.

ulations in their bills of lading. *Liverpool Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 441. See also *Ansaldo San Georgio I* v. *Rheinstrom*, 294 U. S. 494, 498; *Straus & Co.* v. *Canadian Pacific Ry. Co.*, 254 N. Y. 407, 412.

(a) *The cargo owners are faced with a united front of all steamship owners acting in concert seeking to impose the clause upon them.*

The situation with respect to the Both-to-Blame clause is unusually aggravated. Since 1935 when the Both-to-Blame clause was first introduced it has been generally adopted by practically all steamship companies doing business to and from the United States (R. 139). It has been in use by a combination of steamship companies known as the North Atlantic Freight Conference since 1937 (Pet. Brf. 5, fn. 3). It is spoken of as a standard provision of ocean bills of lading today (Pet. Brf. 11). Presented with such a united front by shipowners acting in concert, the individual shipper is obviously helpless.

In November 1942, at the time of these shipments, the War Shipping Administration completely monopolized American ocean shipping having requisitioned for operation all American cargo vessels (W. S. A. Press Release, Apr. 18, 1942, N. Y. Times, Apr. 19, 1942, p. 8). The Court of Appeals therefore quite appropriately said that at most the clause is consensual in name only (R. 139).

Nevertheless, petitioner has represented the clause as "a private consensual agreement" (Pet. Brf. 35; see also Petition 10, 15) and has stated that the question is only whether "the problem is one on which the parties are free to contract" (Pet. Brf. 8). Petitioner's counsel have gone so far as to select from the list of impleaded cargo owners from whom indemnity is demanded the names of nine large and well-known corporations and to comment that they do not believe that these corporations are quite so helpless as the Court below suggested (Pet. Brf. 31, fn. 20).

This is a wholly inadequate presentation. Actually of

the 112 respondents impleaded from whom indemnity is sought under the clause (R. 40-43), 19 are individuals and 12 (including a number of returning government employees) were shippers of household goods and personal effects ranging in value up to $4,000. Most of the remainder are obviously small business corporations or partnerships. According to the general average statement only 29 of the impleaded cargo owners had shipments valued at over $5,000 and 69 had shipments valued at under $2,500. Twenty-seven of the respondents impleaded were not assureds of the intervening insurance companies and so far as appears were uninsured.

We do speak for the large shippers, but we equally speak for the more numerous little shippers, insured or otherwise, whose shipments are to them probably more important. This Court's decision will determine the rights of all. Even the large shippers are helpless before the united front of carriers unless they are in a position to charter whole ships to distribute their products and collect their raw materials.

(b) *To permit enforcement of the Both-to-Blame clause would be to allow the shipowners to become legislators and to compel cargo owners to surrender their rights against a negligent non-carrier as no statute has done.*

The question is not whether the parties may agree. There is no element of willing consent to the clause. No shipper would advisedly agree to it. The Both-to-Blame clause is attempted to be forced upon them for the shipowner's advantage. The question is will the shipowners thus be permitted unilaterally to alter our fundamental law of collision liability and to require so definite a relinquishment of the rights given to innocent cargo owners against a negligent non-carrier under our law without legislative authority (R. 140). To permit them to do so would be to allow them to become legislators (R. 137). This is obviously a matter of policy for Congress to determine (R. 143).

II.

The Both-to-Blame clause is not supported by the Harter Act or the Carriage of Goods by Sea Act and is contrary to public policy.

Concededly the Both-to-Blame clause is invalid unless supported by some change in public policy brought about by the Acts.

The Both-to-Blame clause in terms demands that the cargo owner indemnify the shipowner against his liability to another shipowner for the claim of that other shipowner or carrier. It is conceded that neither act excuses the shipowner from that liability or gives him any immunity with respect to it (Pet. Brf. 41-42).

It is no accident that the clause is framed as an indemnity for it is conceded that the clause is necessarily and deliberately so cast because of the unquestioned legal principles on which the liability is based (Pet. Brf. 25). To state those principles clearly is not "semantic manipulation" (Pet. Brf. 44) which is the sole province of those who would distort or disguise those principles.

(a) *The right of the innocent cargo owner to a full recovery from the non-carrier is clear.*

Concededly the Harter Act deprived the cargo owner of his right to recover from the carrier his damages resulting from faults and errors in navigation. It did not deprive the cargo owner of his right against any other vessel or owner. As against such other vessel or owner the innocent cargo owner retained his right, unquestioned since *The Atlas* (1876), 93 U. S. 302, to recover his damages, in admiralty as at common law, in full upon proof of negligence of that other, and irrespective of any contention or proof by that other that

there was contributing fault on the part of another. This right innocent cargo owners have in common under our law with all innocent sufferers from the negligence of another. A. L. I. Restatement of the Law, Torts, §§875, 880. This is the only right that the cargo owners or intervening insurers have sought to enforce or enforced in this case. This is the first and primary leg of the "triangle" (Pet. Brf. 41 *et seq.*).

Petitioner's counsel concede that the cargo owners have this right. They further concede that the purpose and effect of the Both-to-Blame clause is to deprive the cargo owner of the benefit of this right "to the extent that the non-carrier is able to shift the burden of cargo loss to the carrier" (Pet. Brf. 42).

(b) *The right of the non-carrier against the carrier is for a division of the damages of the respective vessel owners arising from the collision and the carrier's liability corresponds.*

The negligent non-carrying vessel owner, having been held liable for all the cargo damage on this principle, naturally sought relief through action against the carrying vessel and proof that fault of that vessel contributed, invoking the principle of equal division of damages between vessel owners when both are negligent established by this Court in *The Catherine* (1854), 17 How. 169, 177, as the rule most just and equitable and best tending to induce care and vigilance in navigation on both sides.

In the case of *The Chattahoochee* (1899), 173 U. S. 540, the question arose as to whether the non-carrier, having established contributory fault on the part of the carrier, could include in its claim for its damages resulting from the collision the amount of its payments or liability to cargo on the carrying vessel in view of the provisions of the recently enacted Harter Act releasing the carrier from liability to the cargo owner. It was strongly argued by the carrier there that the non-carrier upon payment

of the cargo damage stood only in the cargo owner's shoes and that to permit the non-carrier to recover a part of his payments to cargo from the carrier would be to disregard and nullify the Harter Act (see p. 552). This Court rejected that argument and held that the sole object of the Harter Act was to modify the relations between the carrying vessel and her cargo and that it had no application to a division of damages between two vessels. The relations between the two vessels remain unaffected by this Act (p. 554).

In *Erie R. R. Co.* v. *Erie & Western Trans. Co.* (1907), 204 U. S. 220, this Court followed its decision in *The Chattahoochee*, and pointed out that the non-carrier's right to a division of its damages consisting of its payments to cargo on the carrying vessel does not stand on subrogation but is its own right. Liability to cargo is damage to the non-carrier arising directly from the tort as one of the consequences plainly to be foreseen. Since the non-carrier's recovery from the carrier is not for cargo damage but for its own injury, neither the bill of lading provisions nor the Harter Act have anything to do with the case (p. 226).

In *Aktieselskabet Cuzco* v. *The Sucarseco* (1935), 294 U. S. 394, 400-401, this Court reiterated and applied this principle.

The liability of the carrier, therefore, does not rest on any principle of contribution between joint tort feasors to a common liability, but on the admiralty principle of equal division between negligent shipowners in collision cases of the damages sustained by them respectively. Petitioner's counsel concede that the liability of the carrier is for damages sustained by the non-carrier as a result of the collision (Pet. Brf. 12, 13, fn. 5, 41-42; see also Petition 8 and 9, fn. 6, subd. 3).

This conception of the nature of the non-carrier's claim and of the liability of the carrier to the non-carrier has been faithfully followed in this case (Pet. Brf. 42, fn. 24). The interlocutory decree awards the intervenors a full

recovery against the "Esso Belgium" only (R. 119-120). The decree then provides that the recoveries by the intervenors shall "be treated as part of the damages of" the owner of the "Esso Belgium" for the purpose of striking a balance between "the damages of the respective vessel owners" and determining the liability of one for the equalizing balance between them (R. 120).

The second leg of the triangle is, therefore, that the non-carrier seeks and obtains from the carrier a division of their respective claims for damages resulting from the collision, and the non-carrier is allowed to include in his claim for such division the amount of his liability to the cargo because his claim for such amount is not a claim for cargo damage but for damages suffered by him arising directly from the tort (the carrier's negligence toward him) on the ground that this liability is one of the consequences of the collision plainly to be foreseen.

(c) *The claim of the carrier against the cargo owner under the Both-to-Blame clause.*

The third leg of the triangle develops when the carrier, having been compelled in the suit of the non-carrier to submit to a division of the damages of the respective vessel owners, and having failed to exclude from that division those damages of the non-carrier consisting of the non-carrier's payments to cargo because those damages are regarded, not as cargo damage but, as an independent injury to the non-carrier resulting directly from the carrier's tort to which the Harter Act is not applicable, nevertheless, seeks indemnity against his liability for these damages from the cargo owners under the Both-to-Blame clause, which it attempts to support on the ground that a liability to the cargo owner for cargo damage has been imposed. This position is untenable.

(d) *There is no recovery by cargo against the carrier and no statutory scheme has been infringed.*

Petitioner's counsel, forced to concede that the carrier's liability is a liability to the non-carrier for damages sustained by the non-carrier as a result of the collision, are forced in the next breath to argue that it is in effect something quite different, *i. e.*, an indirect liability *to the cargo owner* for cargo damage.[6]

Thus they assert with complete inaccuracy that the Both-to-Blame clause would only require the cargo to repay to the carrier such amount as "cargo has in effect recovered from its carrier as a result of the rules stated above" (Pet. Brf. 7). And the culminating statement of their brief is that,—"The plain fact is that respondents [cargo owners] would require a carrier to bear half of the damages incurred by its cargo where both vessels are at fault, * * *" (Pet. Brf. 44).[7] These inaccurate assertions they are forced to make in order to invoke the policy of the Harter Act and the Carriage of Goods by Sea Act that carriers by sea "are not to be chargeable *by their cargo* with responsibility for acts of navigation" (Pet. Brf. 39).

---

[6] Actually the so-called "anomaly" is misstated. No more can accurately be said than that when the carrier is solely to blame he must pay for all the damages sustained by the non-carrier, and when both are to blame he is liable to the non-carrier only for a division of their respective damages. The fact that in the second case the non-carrier's damages will include the non-carrier's liability to the cargo is only incidental to the operation of the principles involved.

The decision of this Court in *Great Lakes Transit Corp.* v. *Interstate S. S. Co.*, 301 U. S. 646, cited petitioner's brief, page 44, makes no change in the principles laid down in the cases which we have cited. That case involved only equities between certain insurers and their carrier insured. The Harter Act was not involved since it had been waived by the carrier who was a named insured in the policy. The policy covered not only cargo but the carrier's legal liability as well.

[7] Compare similar statements, Brief for Respondent Belgian Overseas Transport, S. A., owner M. V. "Esso Belgium", p. 39.

They are immediately betrayed, however, when they say that the Both-to-Blame clause comes into play "only to the extent that the non-carrier is able to shift the burden of the cargo loss to the carrier" (Pet. Brf. 42). Obviously it is the non-carrier, not the cargo owner who "shifts the burden of the cargo loss to the carrier". The non-carrier is able to do this only because the claim which he enforces is for his own damages resulting from the collision to which the Acts have no application. Even though this results in a shifting of the "burden" of a part of the cargo loss to the carrier, the result is not inconsistent with any scheme of distribution of losses adopted by the Harter Act and the Carriage of Goods by Sea Act. On the contrary, it is entirely consistent with that scheme which dealt only with the liability of the carrier to the cargo owner and left the carrier's liability to any other vessel owner precisely as it had been. *The Chattahoochee, supra.*

The statement in petitioner's brief (p. 22) that the acts establish "a uniform statutory scheme under which the risk of cargo damage caused by errors and faults in navigation is to be borne by cargo rather than by carrier" is obviously true in a limited sense only. To the extent that this means that the carriers are no longer "to be chargeable by their cargo" (Pet. Brf. 39) for such damage, we can agree. But the acts clearly do not indicate any more than this. Clearly they do not give the carrier any immunity from his liability to another shipowner.[8] Equally clearly they do not put upon cargo any part of the risk of damage by faults and errors of navigation of another vessel, nor any part of the carrier's risk of liability to another vessel owner as the result of a collision, even though that

[8] In the Brief for Respondent Belgian Overseas Transport, S. A., at page 12, this "statutory scheme" is described as "The policy of total immunity [to the carrier] announced in both the Harter Act and the Carriage of Goods by Sea Act". Obviously no immunity was granted to the carrier with respect to his liability to another shipowner.

liability may include some transfer of the non-carrier's burden of liability to the cargo. To describe such transfer as an indirect liability for cargo damage does not help petitioner. It is not a liability *to the cargo owner*, and it is only with the vessel owner's liability to the cargo owner that the Acts deal.

The plain fact of the matter is quite contrary to that stated by petitioner's counsel. The cargo owner does not require the carrier to bear half of the damages incurred by its cargo. Neither does the cargo owner recover from the carrier "in effect", "indirectly", or otherwise. Cargo owners and their insurers have not sought or obtained any recovery from the carrier. They have sought and obtained a recovery from the non-carrier only. If the non-carrier vessel were lost or unsuable, or if the non-carrier and its surety should disappear from the picture today, the cargo interests could obtain no recovery. If the non-carrier were able to limit its liability to an amount less than the amount of the cargo damage the cargo interests could obtain no more, although they would be entitled to a preference in the distribution of the limitation fund. *The Geo. W. Roby*, 6 Cir., 111 Fed. 601, cert. den. 183 U. S. 699.

Actually in this very case the cargo interests are not even parties to the suit of the non-carrier against the carrier, except as the cargo owners have been impleaded therein by the carrier. There is no pleading in either case on which cargo owners or their insurers could possibly be awarded any recovery from the carrier.

It is perfectly clear that the cargo recovery will be paid by the non-carrier or not at all.

(e) *No division of damages between the vessel owners should be permitted to affect the cargo owner's right to a full recovery from the negligent non-carrier.*

The carrier's liability arises solely out of the operation of the principle of division of damages between negligent

shipowners existing in admiralty in collision cases. If that principle had not existed, or if it had been held inapplicable in the case of *The Chattahoochee, supra,* the cargo owner would not have been adversely affected, for no question was raised as to the right of the cargo owner to recover his damages in full from the negligent non-carrier under the decision in *The Atlas, supra.* The petitioner's argument in that case was that the non-carrier should bear the cargo loss in its entirety.[9]

Such a result was reached in a case recently before this Court, *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, Nos. 62 and 197, October Term, 1951, decided January 14, 1952. In that case the negligent non-employer was required to bear the entire damage suffered by an innocent workman, without benefit of contribution from the more negligent employer who was protected from liability for negligence by the Longshoremen's and Harbor Workers' Compensation Act, it being held that no right of contribution existed. So but for the rule of division of damages between shipowners would the owner of the "Esso Belgium" have been required to bear the entire loss of the innocent cargo owners here.

The action of the non-carrier in seeking a recovery from the carrier is beyond the control of the cargo owners. They are not chargeable therewith nor should they be deprived of any rights thereby. The rule of equal division of damages between negligent vessel owners was adopted to do justice between them, and this Court in *The Atlas, supra,* 93 U. S. 302, 318, said that in adopting this rule it did not intend to adopt a rule which would deprive innocent parties of full compensation nor could it ever sanction such a result. To deprive the cargo owner of the

---

[9] The argument ran—"while in this case it works an apparent hardship upon the steamer, (a hardship more apparent than real, owing to the greater fault of the steamer,) it does not in reality extend her liability, but merely prevents her taking advantage of a deduction to which without the act she might have been entitled". (See page 552.)

full recovery to which he is entitled from the negligent non-carrier because a division of damages is allowed between the vessel owners would be to do just that.

Actually the shipowner's complaint of an anomaly is based only on an interference of the special privileges which have been accorded to him. The admiralty rule of division of damages between negligent vessel owners was adopted in his interest as producing a fairer and more equitable disposition of burdens between shipowners than the harsh rule of the common law requiring a negligent shipowner to bear the entire burden of his damages sustained as the result of a collision without redress against another shipowner whose negligence also contributed. While this rule may increase his burden in a given case (as for the "Nathaniel Bacon" here), it will reduce his burden in another (as for the "Esso Belgium"). In the next case the positions may be reversed.

There have been learned discussions on the subject of whether a rule permitting a negligent person who has been held liable for the entire damage of an innocent sufferer to compel another person whose negligence has contributed to share his burden is desirable or in the public interest.[10] But there has been no suggestion that the innocent sufferer should be compelled to bear the consequences.

The shipowner's release from the direct claims of shippers for negligent damage to goods in his care, bestowed upon the common carrier of goods by sea by the Harter Act and the Carriage of Goods by Sea Act, is a special privilege not granted to other common carriers (a legal "anomaly" in itself).

The shipowner's complaint is based on the proposition that the operation of the equitable rule of division of damages adopted in his general interest as being more fair and equitable has the practical effect in some cases

---

[10] *See*: James, Contribution Among Tort-Feasors, A Pragmatic Criticism, 54 Harv. L. Rev. 1156; Gregory, Contribution Among Tort-Feasors, A Defense, 54 Harv. L. Rev. 1170.

of depriving him of a portion of the benefit of his special privilege of release from direct claims of shippers. He therefore conceives that he should be able to extend his special privilege beyond anything given him by the statutes and for his own benefit to deprive the innocent cargo owner of a portion of the proceeds of the cargo owner's rights under the rule of *The Atlas*, something that certainly was not done or contemplated by the Harter Act.

In this connection the observation of Senator Schwellenbach at the hearings on the Brussels Collision Convention, 1910, is pertinent. He said:

> "I appreciate that to be the effect of the convention, but I do not see how the shipowners were in a position to complain about an anomalous situation when it was their own effort to get protection against liability to cargo owners that started the matter."[11]

What would be anomalous would be if the unquestioned rights of innocent cargo owners to recover (and retain) full damages from a negligent non-carrier were held to be subject to confiscation of half the amount thereof by the carrier by virtue of the carrier's own negligence.[12]

The obvious remedy for the shipowner's position would be to abolish or limit the operation of the division of damages rule. That would harm no innocent person. But that would require legislation and would not please the shipowners. Consequently, they reason that the innocent

---

[11] See Report of Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Congress, 2d Session, January 10-14, 1938, p. 408.

The alleged anomaly resulting from the decision in *The Chattahoochee* was being urged by the shipowners as a reason for ratification of the Convention which would have adopted the rule of liability for property damage proportionate to degree of fault thereby reducing cargo's right of recovery against the non-carrier in a both to blame case. Ratification was successfully opposed by cargo interests and others, including seamen, whose property claims would have been affected.

[12] See, Stanford Law Review, February 1952, Vol. 4, No. 2, pp. 286, 288.

cargo owners are legitimate prey and may be vulnerable to a clause forcing an additional burden upon them. We submit that the cargo owners are entitled to protection from such an imposition.

Actually, if the Both-to-Blame clause is upheld, its effect will be to destroy that very equal division of the damages between negligent shipowners which it is the object of the division of damages rule to achieve, and which has heretofore been considered just. If the carrier is to be given "immunity" from liability for a part of the division of damages, and the burden transferred to the innocent cargo owner, it is obvious that the carrier will bear a lesser burden of the damages than the non-carrier, and the rule of equal division which is the source of the carrier's liability will have failed to achieve its purpose.

(f) *The Both-to-Blame clause is of necessity an indemnity, not an immunity, clause.*

Petitioner's counsel use the term "immunity" much too loosely. When they say that the acts "make ocean carriers immune from liability to their cargo" (Pet. Brf. 6) and that the carrier is, therefore, entitled to enjoy "relief from responsibility to its cargo" (Pet. Brf. 7) we can agree. But when they say that the effect of the Both-to-Blame clause is only to give the carrier the same "immunity in a mutual fault situation as it has by statute where it is solely at fault" (Pet. Brf. 14, cf. 7), we must observe not only that the statement is incorrect, but that they have given away their argument.

What the clause demands is not immunity but indemnity, and necessarily so. Obviously it is beyond the power of the cargo owner to give the carrier immunity since the claim asserted against the carrier is not the cargo owner's claim but the non-carrier's. Petitioner's counsel clearly recognize this when they explain that the Both-to-Blame clause does not affect the carrier's liability to the non-carrier for the latter's "collision damages"

(Pet. Brf. 42) consisting of "the amount it had paid as damages to the cargo of the carrying vessel" (Pet. Brf. 41). They also concede that the clause is necessarily cast in the form of an indemnity because of the nature of this liability (Pet. Brf. 25).

What the clause demands of cargo is not immunity, which the cargo can not give, but an indemnity to the carrier against his liability to another shipowner for collision damages resulting from his negligence toward that other shipowner. See *American Mut. L. Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322, 324.

(g) *The demand of the carrier on the cargo owners for an indemnity against the carrier's tort liability to another, is unreasonable.*

It is axiomatic that to be sustained the Both-to-Blame clause must be both just and reasonable.

Express Co. v. *Caldwell*, 21 Wall. 264, 266-8;
Liverpool Steam Co. v. *Phenix Ins. Co.*, 129 U. S. 397, 441;
Railroad Co. v. *Pratt*, 22 Wall. 123, 134;
The Kensington, 183 U. S. 263, 268;
Ansaldo San Georgio I v. *Rheinstrom Co.*, 294 U. S. 494, 498-9.

The bare statement that the indemnity sought is against the vessel owner's tort liability to another vessel owner should sufficiently, we submit, demonstrate its unreasonableness. To give a carrier a release from the direct claims of shippers, as the Acts have done, is drastic, but to require that the cargo owner shoulder the burden of the shipowner's tort liability to another vessel owner is, we submit, without precedent and beyond all reason.

The effect of the clause would be to make the innocent cargo owner responsible for the negligent acts of the shipowner's servants towards the other vessel owner.

Those servants are not agents of the cargo owner or subject to his control. *The Atlas*, 93 U. S. 302, 311.

It is clearly not sufficient for petitioner to say that the Both-to-Blame clause operates only in situations when the Acts relieve the carrier from liability to its cargo (Pet. Brf. 35) or that it does not constitute a contracting out of any of the redefined essential duties of the carrier to the cargo (Pet. Brf. 32). Surely it is not true that any clause is valid provided only that the essential duties owed by the carrier to the cargo owner are not reduced by the contract.[13] If that were true the carrier could demand of the cargo a complete indemnity against his entire liability to the non-carrier, or even against any physical damage to his own ship or other loss arising from a collision, under the same circumstances.

Petitioner's counsel criticizes the Court of Appeals for relying on decisions denying validity to clauses relieving the carrier from liability for negligence (Pet. Brf. 9, 31) in illustration of the proposition that the cases show that the courts have not been at all disposed to reduce the common carrier responsibility of the shipowner (R. 140, 141). The fact of the matter is that heretofore the unreasonable clauses proposed by carriers have been limited to clauses designed to permit them to escape liability to the cargo owners for damage resulting from their negligence. Never before, so far as we are aware, have shipowners gone so far as to demand from their cargo an indemnity for the shipowner's own loss or liability resulting from the shipowner's negligence. It would seem clear to us that when clauses tending to release the carrier from liability for negligent injury to cargo otherwise than as specifically permitted by statute have been uniformly held void as unreasonable, *a fortiori* should any clause demanding from the cargo owner indemnity for loss or liability sustained by the

[13] The argument in the Brief for Respondent Belgian Overseas Transport, S. A. is based chiefly on this ground, see pp. 5, 6, 7; 15, 16, 22. See comment, *infra*, pp. 45-49.

carrier himself as a result of the carrier's own negligence be held invalid. The Acts do not indicate otherwise.

(h) *The Jason clause is not an indemnity clause.*

The *Jason* clause (Pet. Brf. 36) is not an indemnity clause. It does not contain the word indemnity. It is a clause which brings into play the principles of equity and reciprocity upon which the entire law of general average is founded. *The Jason*, 225 U. S. 32, 57. The clause deals only with general average. To represent the *Jason* clause as an indemnity clause is to misrepresent the principles of general average with which it deals.[14]

The *Jason* clause provides only that the shipowner and the cargo owner shall both contribute in general average that is, to those sacrifices and expenses incurred by the *voluntary* act of the Master, *after* a disaster, *as the common agent of both*, to save all interests from a greater loss. *Ralli* v. *Troop*, 157 U. S. 386, 397-401. No interest is indemnified. Even sacrificed interests contribute on the amount of the sacrifices allowed so that they will be no better off than if another interest had been chosen for sacrifice. Congdon on General Average, 2nd Ed. 167. Each interest contributes only pro rata according to its benefits received, that is, on the value of the interest saved. The clause is reciprocal and gives equal rights to both.

The *Jason* clause produced a desirable result. But for this clause the Master as the sole agent of the shipowner could have sacrificed cargo to save the ship with impunity under the protection of the Harter Act. *The Jason*, 2 Cir., 178 Fed. 414, 417.

The *Jason* clause merely enables cargo to have the Master as its agent at the time and place of peril to make such sacrifices as may be timely and most effective

[14] In the Brief for Respondent Belgian Overseas Transport, S. A. the *Jason* clause is consistently represented as an indemnity clause, see pp. 8, 10, 19.

to avoid a greater loss. It operates only in a situation where the cargo owner has already suffered a loss which may prove to be total through the negligence of the carrier for which the cargo owner has no redresss. It puts cargo in a better position by restoring the Master to a position of impartial agency for all interests to minimize that loss. And to secure that right cargo agrees to contribute to those sacrifices in general average. *The Toluma*, 2 Cir., 72 F. 2d 690, 693, affirmed *sub nomine Aktieselskabet Cuzco* v. *The Sucarseco*, 294 U. S. 394, see pp. 402-3.[15]

By contrast the Both-to-Blame clause would definitely result only in prejudice to the rights of cargo. Rights under it are not reciprocal. It is based on no doctrine of recognized equity and justice and it in fact places the cargo owner in a worse position because of the negligence of the carrier. Stanford Law Review, February 1952, Vol. 4, pp. 286, 288.

Although the Both-to-Blame clause has been patterned upon the *Jason* clause in an attempt to obtain plausibility, the Court of Appeals found the analogy not persuasively close (R. 147) and, we submit, the court was right.

Granted that the decision in the case of *The Jason* stands for the proposition that since the Harter and Carriage of Goods by Sea Acts, it is now competent for carriers to contract in a manner which would not have been permitted before the enactment of those Acts consistent with the policy found expressed in those Acts (Pet. Brf. 34), it is still necessary for petitioner's counsel to find a policy expressed in those Acts which would justify the Both-to-Blame clause.

---

[15] The Carriage of Goods by Sea Act contains a provision expressly intended to preserve the validity of the Jason Clause. Section 5, last sentence, 46 U. S. C. 1305. The Hague Rules, when framed, were considered to have no effect on General Average, see discussion London conference, Bulletin No. 57, International Maritime Committee, London Conference, October 11, 1922, pp. 476-479.

(i) *There is no policy indicated in the Harter Act which supports the Both-to-Blame clause.*

The sole object of the Harter Act was to modify the direct liability previously existing between the vessel and its cargo. *The Delaware,* 161 U. S. 459, 474; *The Chattahoochee,* 173 U. S. 540, 554-5.

It is quite true that the Harter Act was promoted in response to demands from shippers (Pet. Brf. 14-15). The demand was for relief from unreasonable clauses restricting the liability of the carriers. *The Delaware, supra,* pp. 471-474. As discussed and passed in the House, the Bill had only this effect. In presenting the Bill to the House for passage, Mr. Lind explained that the Bill went "only to the extent of providing that these companies shall not exact such bills of lading; further than that the Bill does not go" (24 Cong. Rec. 148). The House Report on the Bill is extended in the record and comments only on the onerous clauses against which the Bill was directed, with examples.

The passage of the Bill in the House was accompanied only by similar comments (24 Cong. Rec. 171-173).

This was the extent of the promotion of the Bill by cargo interests.

The Bill was drastically amended in the Senate at the behest of the shipowners, and Section 3 placed in its present form to give a carrier, who had exercised due diligence to make his ship in all respects seaworthy, an exemption from liability to the cargo owner for cargo damage resulting from faults and errors in navigation.

The very fact that cargo interests who were represented at the hearing apparently acquiesced in the enactment of Section 3 in its revised form should be the basis for restricting the scope of the Act to the precise effect of the language chosen. Certainly those cargo interests who were represented had no thought of giving up any part of their rights against a negligent non-carrier.

What the carrier did not even ask for in the "legislative halls", he should not be granted now in the form of a contract forced on the cargo owner for the purpose of filling an alleged gap (R. 137). We submit that the criticism of the Court of Appeals for treating Section 3 of the Harter Act as "remedial legislation" which the courts should be reluctant to extend (Pet. Brf. 9) is quite without foundation.

Being in derogation of the common law liability, Section 3 of the Harter Act has uniformly been construed strictly and literally. *The Carib Prince*, 170 U. S. 655, 661-2; *The Irrawaddy*, 171 U. S. 187, 195-6; *The Wildcroft*, 201 U. S. 378, 388-9; *May* v. *Hamburg &c.*, 290 U. S. 333, 351.

At the time of enactment of the Harter Act the rule of equal division of damages between vessel owners had long since been established. *The Catherine* (1854), 17 How. 169. There is no indication that this rule was then considered to be affected. On the contrary, in view of the well-settled nature of the general rule at the time, it must result that legislative approval was by clear implication given to the general rule since it was not changed. *The Kensington*, 183 U. S. 263, 268-9; *The Geo. W. Roby*, 6 Cir., 111 Fed. 601, 614-621, cert. den. 183 U. S. 699.

Contemporary comment does not indicate that the shipowners felt outraged by the decision in the case of *The Chattahoochee*. On the contrary, in 1899, in an address before the International Law Association on the subject of the Harter Act, following the decision in *The Chattahoochee*, Everett P. Wheeler, eminent shipowner's counsel of New York, extolled the benefits to shipowners of the Harter Act and, in summarizing its effects, set forth the result of the decision in *The Chattahoochee* without comment. Report of 18th Conference, The International Law Association, pp. 178-200. His view of the effect of the decision in *The Chattahoochee* was only that—"The limitation of liability given by the act to the carrier does not increase the liability of the other tort feasor" (p. 196).

He also pointed out that "Any extension of the Harter Act must be sought from legislation and not from the courts" (p. 194).

In the case of *American Mut. Liability Ins. Co.* v. *Matthews*, 2 Cir., 182 F. 2d 322, 326, Learned Hand, *C. J.*, analyzed the purposes and results of the Harter Act. He pointed out that in the balancing of relief and burden to the shipowner in the Act, the compensating burden placed on the shipowner was very slight while the relief from liability to the cargo owner for damage resulting from negligence was substantial. Consequently, it was his conclusion that the effect of the doctrine of *The Chattahoochee* is that the sum of the changes in the owner's duties was not enough to justify extending the release beyond the direct claims of shippers.

Since the decision in the case of *The Chattahoochee*, the results of that decision have been generally supposed by distinguished experts to be included in the policy of the United States as represented in the Harter Act (R. 145, fn. 8). In 1938, Charles C. Burlingham, Esq., eminent shipowner's counsel, voiced this view when testifying before a Senate Committee in support of the Brussels Collision Convention, 1910, which would have modified the rights of cargo owners by reducing the liability of the non-carrier to liability proportionate to degree of fault. He said:

> "In the second place, if Mr. Englar asked me the question he asked Mr. Sayre, I might well have conceded that the policy of the United States is shown not only in the Harter Act, but in the interpretations of the Harter Act, and I suppose that the 'Chattahoochee' is a part of the policy of the United States at this moment, until it is changed." Report of Hearings on Brussels Collision Convention, 1910, before a Subcommittee of the Committee on Foreign Relations, U. S. Senate, 75th Congress, 3d Session, January 10-14, 1938, p. 72.

In his letter of instructions to the delegates appointed to represent the United States at the conference which

framed the Brussels Collision Convention, 1910, the Assistant Secretary of Commerce stated that the principle of liability of the non-carrier only proportionate to degree of fault was "at variance with the Harter Act of February 13, 1893, which, as construed by the Supreme Court, relieves the carrying ship from liability for damages to cargo in such cases, but allows the non-carrying ship to recover contribution from the carrier". The delegates were instructed to "procure the insertion in the protocol of an explicit reservation on the subject on behalf of the United States" which would preserve the effect of the Harter Act as thus construed, "which must be regarded as defining the settled policy of the United States respecting both the relief of carrying ships from direct responsibility and their indirect responsibility for injury to cargo". Report of Hearings on Brussels Convention, 1910, Before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Cong., 2d Sess., January, 1938, p. 14.

The delegates failed to carry out their instructions and the Convention was therefore found unacceptable in this country and has not been ratified (see *infra*, pp. 37, 46).

We submit that the Court of Appeals was right. The American policy as embodied in the Harter Act is clear and it is against the Both-to-Blame clause (R. 145).

(j) *The Carriage of Goods by Sea Act goes no further.*

It can hardly be suggested that the Carriage of Goods by Sea Act goes further, or has any broader effect in any manner here pertinent than did the Harter Act. The single significant additional advantage to the carrier was the elimination of the condition of the exercise of due diligence to make his vessel in all respects seaworthy on which his release from direct liability to the cargo owner in the Harter Act depended, although the duty to exercise due diligence to make his ship seaworthy was continued (Sec. 3. (1), 46 U. S. C. 1303).

On the other hand, substantial additional benefits were granted to the cargo owner in the form of protection from certain onerous clauses customarily exacted by shipowners (see Pet. Brf. 21, fn. 11). The support of the cargo interests for the Bill was enlisted and obtained because of these definite benefits and because of the fact that it was considered that certainty of the respective rights and obligations of carrier and cargo owner would result.

The Both-to-Blame clause was first promulgated in 1935 only a few months before the bill came before Congress for consideration. However, the cargo interests who supported the bill were satisfied not only that the Both-to-Blame clause would be as invalid and unenforceable under the proposed Act as under the Harter Act, but also that the Both-to-Blame clause would be specifically prohibited by Section 4(3) of the proposed bill (see *infra*, p. 39). Nevertheless one of the cargo interests represented at the hearings on the proposed bill considered that it would be desirable to add to the bill a specific prohibition which would in terms outlaw the recently introduced Both-to-Blame clause in order that extended litigation over the validity of that clause might be forestalled and prevented. Mr. Englar, representing the American Institute of Marine Underwriters, therefore, appeared before the Senate Committee and read a prepared statement from which the following are excerpts:

> "A careful study of the above bill has satisfied the institute that the clause above quoted is prohibited by section 4 (3) of the bill, which reads as follows:
>
> 'The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.'
>
> The institute, therefore, supports the bill, but suggests that section 4 (3) be amended to read as follows:
>
> The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, or *liability therefor incurred*, by the carrier or the ship arising

or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner or cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.* (New matter italicized.)

* * * *

Under these circumstances it will naturally be argued that, if the statute in its present form is clear, no amendment is necessary. Our answer to this argument is that the objectionable clause has only recently been introduced, and it must be anticipated that the carriers will make a determined effort to sustain it. Its validity will undoubtedly be the subject of protracted litigation. The purpose of the rules is to avoid such litigation, and if the objectionable clause had been introduced at the time the Hague rules were formulated, it would undoubtedly have been prohibited by express reference. This was done in the case of a far less objectionable clause, *i. e.*, 'The benefit-of-insurance clause,' which is specifically referred to in section 3 (8).

The institute, therefore, urges the amendment of 4 (3) above quoted, and, if this amendment is not adopted, the Institute desires specifically to reserve the privilege of urging appropriate legislation dealing expressly with the objectionable 'Both-to-Blame collision' clause." (Hearings Before Committee on Commerce, U. S. Senate, 74th Cong., 1st Sess. on S. 1152, pp. 53, 54.)

In petitioner's brief, page 29, Mr. Englar is quoted as saying that "The rules in their present form, and that the Bill 1152 in its present form, does not invalidate this objectionable clause". The omission of the word "specifically" before "invalidate" was obviously either inadvertent or a reporter's error. Immediately following the reported statement, Mr. Englar said—"Therefore, as long as this clause has come up, my suggestion here is that we deal with it *specifically*; but if that will be the final straw

which prevents the adoption of the law, I will waive it." The quotation in petitioner's brief from Mr. Englar's testimony is an obvious misrepresentation of the position of Mr. Englar and his clients.

Other cargo interests represented at the hearing thought that Mr. Englar's proposal was unnecessary and that since it was objected to by the carrier interests it should not be pressed since this might jeopardize the passage of the bill which, in its other provisions, gave the cargo owners much needed relief. Speaking for these interests, Mr. Walter said:

> "A clause has been recently incorporated in some bills of lading, to which Mr. Englar referred, which does violate provision 3 of the section referred to, and therefore could not be enforced, because the very enacting clause—lines 3 to 6 at the beginning of the act—say:
>
> That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this act" (Hearings, *supra*, p. 59).

In view of the misleading quotation of Mr. Englar's testimony by petitioner's counsel we print as an appendix to this brief the section of the Report of Hearings covering the above transactions (see *infra*, pp. 64-77).

Mr. Englar's statement was also read before the House Committee by W. J. Nunnally, Jr.,[16] appearing for Mr. Englar, who was ill, and the proceedings there were similar. Hearings before Committee on Merchant Marine and Fisheries, House of Representatives, 74th Cong., 2d Sess., on S. 1152, January 26, 1936.

As noted in petitioner's brief (pp. 27-28), Mr. Keating, representing the American Steamship Owners Association,

---

[16] The quotation from the Virginia Law Review, Brief for Respondent, Belgian Overseas Transport, S. A., p. 29, fn. 12, suggesting that Mr. Nunnally agreed that §4(3) does not affect the legality of the Both-to-Blame clause is quite erroneous. The other statements referred to were by shipowners' representatives.

and Mr. Haight, who appeared before a later Committee as the paid representative of foreign steamship owners' P. & I. underwriters (see *infra*, pp. 48-49), objected strenuously to the inclusion of Mr. Englar's proposed amendment. In order to avoid jeopardizing the bill, and since the clause was believed to be forbidden in the bill as it stood, the amendment was, therefore, not pressed, and there is no indication that it was seriously considered by either the Senate or the House Committees. Under these circumstances, we submit that any deduction from the fact that Mr. Englar's proposal was not adopted that Congress inferentially approved the Both-to-Blame clause is wholly unwarranted.

(k) *The Both-to-Blame clause violates the stated purposes of the Carriage of Goods by Sea Act.*

In its Report No. 2218 on S. 1152, the House Committee stated the purposes of the Act as follows:

> "The purpose of this bill is to define by law the rights and liabilities of water carriers and shippers in foreign commerce" (p. 1).
>
> "The uniformity and simplification of bills of lading will be of immense value to shippers who will be relieved of the necessity of closely examining all bills of lading to determine the exceptions contained therein to ascertain their rights and responsibilities; to underwriters who insure the cargo and are met with the same difficulties; and to bankers who extend credit upon the bills of lading" (p. 7).

In the Senate Report, No. 742, on the same bill it was stated:

> "It also will accomplish real uniformity and agreement with many other nations as to the text of those clauses of ocean bills of lading with which the bill deals" (p. 4).

Concededly, the Both-to-Blame clause is a purely American clause, of importance only in this country. If the clause is held valid, cargo owners, principally American, who of necessity must litigate for collision recoveries in this country, will be subject to the burden of an indemnity clause known nowhere else.

Their position will be much worse than, for instance, under the law of England or under the Brussels Collision Convention. Under such law, the cargo owner's recovery is indeed limited to a proportion of his damages equal to the non-carrier's degree of fault. This the cargo owner knows, and that is the end of the matter.

In this country, on the other hand, the cargo owner is left subject to a potential and uncertain liability which may hang over his head for many years. For instance, in this case 10 years after the collision, the cargo owners, some of whom have not been served with process under the impleading petition, are still subject to suit in New York or elsewhere on the carrier's claim.[17] Obviously the enforcement of the Both-to-Blame clause will lead to great uncertainty and confusion in collision cases, especially when complicated by proceedings for limitation of liability under the Limited Liability Act (R. S. §4281, *et seq.* as amended, 46 U. S. C. 181 *et seq.*) (see R. 138 and fn. 2).

If the Both-to-Blame clause is a valid clause, no longer can a shipper, a banker, or an insurer rely on the definition of the cargo owner's rights and responsibilities in the Act. Here is an onerous responsibility forced on the cargo owner quite outside the Act. The certainty and uniformity of rights and responsibilities sought by the Act is therefore destroyed.

---

[17] In the case of *Erie R. R. Co.* v. *Erie Trans. Co.* (1907), 204 U. S. 220, the collision had occurred on October 21, 1891. The cargo owners had collected their damages from the non-carrier as the result of the decision in the *New York*, 175 U. S. 187. If there had been a Both-to-Blame clause in that case, the cargo owner would have been subject to the carrier's suit for indemnity more than 16 years after the collision, and long after they had collected their damages from the non-carrier.

There are, however, further indications of the policy of the Carriage of Goods by Sea Act. Section 5 (46 U. S. C. 1305) by expressly giving permission to the carrier to surrender or lessen his rights under the Act "impliedly excludes permission to the carrier to increase his rights". Temperley's Carriage of Goods by Sea Act, 4th Ed., p. 64. And Section 4(3) expressly provides that the shipper shall not be responsible for loss or damage sustained by the carrier resulting from any cause without the neglect of the shipper (see *infra*, p. 39 *et seq.*). Moreover, Section 6 (46 U. S. C. 1306) permits voluntary agreements with respect to particular goods only provided they are placed in a non-negotiable receipt and are not incorporated in negotiable bills of lading, and provided also that "the character or condition of the property" and the special "conditions under which the carriage is to be performed are such as reasonably to justify a special agreement". The Both-to-Blame clause cannot qualify under this provision since it is contained in the bills of lading. It, therefore, cannot be justified as a "special agreement".

Furthermore, the Act in the final sentence of Section 3(8) (46 U. S. C. 1303) specifically voided a far less objectionable clause, *i. e.*, the benefit of insurance clause, and it consequently seems quite clear to us that if the Both-to-Blame clause had been in use at the time the Hague Rules were formulated, that clause also would undoubtedly have been prohibited by express reference (see comment by Mr. Englar, *supra*, p. 31).[18]

---

[18] §3(8) not only forbids "any benefit of insurance clause" but also any "similar" clause. The Both-to-Blame clause is an attempt by carriers to secure the benefit of the cargo owner's insurance by indirection, on the unwarranted assumption that all cargo is insured (see R. 140, fn. 4). The cargo owner is himself required to stand as insurer of the carrier and can protect himself against the liability sought to be imposed only by insurance. The Both-to-Blame clause is, therefore, a forbidden compulsory insurance clause. *Inman* v. *So. Car. Rwy. Co.*, 129 U. S. 128, 139. The carrier cannot obtain by indirection that for which he may not stipulate directly. *The Turret Crown*, 2 Cir., 297 Fed. 766, 778, cert. den. 264 U. S. 591. The Both-to-Blame clause is a benefit of insurance or similar clause and, therefore, forbidden.

The Both-to-Blame clause is, we submit, entirely contrary to the purposes and the fundamental policy, as well as the specific provisions, of the Carriage of Goods by Sea Act.

(1) *The Both-to-Blame clause is an attempt by shipowners to secure the distribution of cargo losses accomplished in certain foreign countries by the Brussels Collision Convention, 1910, on principles rejected here, rather than in accord with any principle adopted by the Acts. Any such change is for Congress, not the shipowners, to make.*

The purpose, and proposed effect, of the Both-to-Blame clause is concededly to limit the net recovery of the innocent cargo owner from the non-carrier to fifty percent of his damages in cases where both vessel owners are to blame. Conceding his right to a full recovery, the shipowner would allow him to retain "only that portion of the damages for which the non-carrier is ultimately responsible" (Pet. Brf. 14). This is the equivalent of liability of the non-carrier only proportionate to the non-carrier's degree of fault.

In England the so-called moiety rule limiting the recovery of the cargo owner against a non-carrier to a moiety, when both vessel owners were at fault, was established in the admiralty courts in *The Milan* (1861), Lush Adm. 388. The common law rule allowed a full recovery but the admiralty rule became the general rule in England as a result of the Judicature Act of 1873 which made the rules then enforced by the admiralty courts the law of England in all courts in maritime cases.[19]

---

[19] Even in England the moiety rule established by *The Milan* has been severely criticized by English Judges and textwriters, as being "unjust", "unsound", and "not based on any principle whatever", and further as probably arising from a misinterpretation of the earlier decisions, as pointed out in the opinion of

[Footnote continued on following page.]

The principle of *The Milan* was strongly urged upon this Court, carefully considered, and rejected in *The Atlas, supra* (1876), 93 U. S. 302, 314-317. The principle of *The Milan* was incorporated in the Brussels Collision Convention, 1910, with a further provision permitting the courts to divide liability in other proportions than 50-50. The Convention was embodied in the English Maritime Conventions Act, 1911, and ratified by a number of other foreign countries. That Convention has been consistently opposed in this country and has failed of adoption.

In the Court below shipowner's counsel frankly stated that the purpose of the clause was to secure a somewhat similar distribution of the cargo loss to that which is accomplished elsewhere by the Collision Convention (R. 139, and see Pet. Brf. 11 and fn. 4). This is again stated in the Brief for Respondent Belgian Overseas Transport, S. A., filed in this Court, page 25. It is true as stated in this same brief that the Convention was opposed on behalf of passengers, crews, and labor unions whose property rights as innocent sufferers would have been restricted in the same manner as those of equally innocent cargo owners, a circumstance which surely indicates the undesirability of the application of the principle of the Convention to any innocent person.

Probably the most effective, though not basic, argument against the ratification of the Convention was that

---

[Footnote continued from preceding page.]

this Court in *The Atlas, supra,* 93 U. S. 302, pp. 314-315. For instance, in Marsden on Marine Collisions, 9th Ed. 1934, p. 136, the English rule is criticized as "working positive injustice" in that "it prevented the innocent owner of cargo on either ship from recovering from the wrongdoing owner of either ship more than a part of his loss"; and in Roscoe on Damages in Marine Collisions, 3rd Ed., pp. 20, 21, the rule is criticized as being "not logically satisfactory" and "historically unsound". And see *The Drumlanrig* (1910), Prob. 249, at p. 262 and p. 269; and *Stoomvaart etc. v. P. & O. Navigation Co.* (1882), 7 App. Cas. 795, 819. In the cases cited the moiety rule, while criticized, was held not open for further discussion in the English courts in view of the provision of the Judicature Act.

interposed by the representatives of the American Steamship Owners Association and other commercial interests, that no such fundamental change should be made in our "basic American law with respect to collisions" except "in the usual way by an Act passed by both Houses of Congress" (Brief for Respondent Belgian Overseas Transport, S. A., p. 26, fn. 10).[20]

Similarly, no such fundamental change in our basic law of liability for collision damage as that demanded by the shipowners through the medium of the Both-to-Blame clause should be permitted through the unilateral action of the shipowners amounting in itself to legislation.

Surely this is a situation in which many groups of persons with varying interests are vitally concerned with the administration of the acts relating to shipowners' liability as an integrated whole, as to which only legislative consideration and action can best bring about a fair accommodation of the diverse but related interests of these groups. *Halcyon Lines* v. *Haenn Ship Ceiling Corp.*, Nos. 62 and 197, October Term, 1951, decided Jan. 14, 1952.

If long settled principles of our law are to be overturned, the change should be made by competent legislative authority, and not left to the control and choice of the one group which is seeking to avoid the burden (R. 140, fn. 4).

We submit that the Both-to-Blame clause is not supported by any policy indicated by the Harter Act or the Carriage of Goods by Sea Act. On the contrary, the Both-to-Blame clause is contrary to public policy as expressed in these Acts (R. 145).

---

[20] Harvard Law Review, December 1951, Vol. 65, pp. 340-341.

III.

The Both-to-Blame clause is contrary to the specific provisions of Section 4(3) of the Carriage of Goods by Sea Act and is therefore unenforceable.

Section 4(3) of the Carriage of Goods by Sea Act, 46 U. S. C. 1304, reads:

> "(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

This broad prohibition is the capstone of the structure of the Act, the purpose of which we have shown, *supra*, p. 33, was "to define by law the rights and liabilities of water carriers" and to make it unnecessary for shippers, bankers and underwriters, to scrutinize bill of lading clauses or to go beyond the terms of the Act itself.

The very purpose of this provision as placed in the Hague Rules, 1922, and from there transferred to the Convention, and to the Act, was precisely to forestall the well understood ingenuity of carriers in drafting and inserting in bills of lading oppressive clauses. The Both-to-Blame clause was, of course, unknown when the Rules were drafted, and what future clauses might appear could not be anticipated. But the prohibition was inserted to make it absolutely certain that no clause to be devised could place any liability whatever on the shipper without his fault. The language, we submit, was well chosen for the effect intended.

As noted in Petitioner's Brief (p. 19) the Carriage of Goods by Sea Act was an enactment of the so-called Hague Rules first drafted at a meeting of the International Law Association at the Hague, August, 1921. That draft, intended only for voluntary use by steamship owners, proved

entirely inadequate. Consequently the rules were completely recast at a meeting of the International Maritime Committee at London, on October 9th-11th, 1922. This is the draft which with minor changes became the Brussels Convention, 1924, and with further modifications not here material was enacted as the Carriage of Goods by Sea Act.

At the London conference Section 4(3) was first introduced in a much more limited form. In the course of consideration it was redrafted and placed in its present all embracing form. The amendment was adopted without opposition after the following statement by the Chairman of the Conference:

> "The Chairman.—My own impression about it is that the words framed here have been designed to give the shipper the largest protection that could be devised for him. I may be wrong about it, but I must take the judgment of the Conference upon the subject. Is it the sense of the Conference that the words which have been read be inserted in the clause? (Agreed)." International Maritime Committee, Bulletin No. 57, London Conference, 1922, p. 480.

The Chairman's statement was not challenged from any quarter, and it was on the basis of this statement that the clause as amended was unanimously adopted as the recommendation of that Conference. No other, better, or different statement as to the purposes of the amended clause was made at the London Conference, at the Diplomatic Conference, or in the halls of Congress while the Act was under consideration.

It follows that if the provisions of Section 4(3) are not broad enough to nullify the Both-to-Blame clause, it is only because human language is inadequate to produce that result.

We have shown, *supra*, pages 30-33, that there is no inference favorable to the Both-to-Blame clause to be drawn from the fact that the Englar proposal for a precautionary amendment specifically outlawing the clause was not adopted. On the contrary, it is clear that cargo

interests supported the bill without that amendment because it appeared clear to them that the provisions of Section 4(3) of the bill as drawn were adequate to prevent the enforcement of the clause. It has never been necessary for them to act on their reservation of the right to apply further for specific relief from the clause because they have not been shown to have been wrong. The clause has never been enforced by any court.

There is no reason we submit for taking §4(3) at less than its face value or giving it a narrower construction than its framers intended.

Only two reasons are given in the text of petitioner's brief why this clause is not applicable.

At page 25 it is said that the Both-to-Blame clause is concerned with responsibility for loss or damage sustained by cargo rather than the carrier or the ship. On the contrary, the clause requires the cargo to indemnify the carrier against the carrier's "loss or liability to the other or non-carrying ship or owner". There can be no question that it is the carrier's loss by reason of his liability which is the subject matter of the clause (see Pet. Brf., p. 13, fn. 5).

At page 26 it is said that §4(3) cannot conceivably have been directed at this clause because it was drafted in 1922 long before the clause came into use. It was precisely because the clause was intended to apply to any future clause contravening its provisions, as well as to clauses which were then known, that the section was couched in such sweeping and all inclusive terms. Actually the Both-to-Blame clause was known when the Act was adopted, and the Act was agreed to by the cargo interests in the confidence that Section 4(3) did apply to the clause.

At page 26, in footnote 15, the further argument is made, however, that Section 4(3) was intended only to protect the shipper from any liability "which might be imposed under national law, beyond that imposed by Section 4(6)". Section 4(6) expressly recognizes and continues in effect the common law liability of a shipper for damage resulting

from the shipment of dangerous goods without the knowledge of the shipowner. Such liability is irrespective of knowledge of the cargo owner and therefore corresponds precisely with the common law warranty of the shipper as set forth in the cases cited. See Temperley's Carriage of Goods by Sea Act, 4th Ed., pp. 66-67.

Any liability of the shipper beyond that of warrantor of the character of his goods as imposed by Section 4(6) would be negligible indeed. The suggested construction would give Section 4(3) practically no meaning, whereas it was devised to give the shipper "the largest protection that could be devised for him". Moreover, it would fly in the face of the precise wording of the section which is to protect the shipper from liability for loss or damage arising from "any cause" without his neglect.

The further suggestion is made, however (fn. 15, par. 2), that Section 4(3) protects only the shipper and not a subsequent holder of the bill of lading or owner of cargo succeeding to the shipper's rights and obligations. The bill of lading is the shipper's contract and any obligations of a subsequent holder arise only from the fact that the law implies an obligation on his part, as successor to the shipper's interest, to be bound by the shipper's contract obligations. It would be strange indeed if the courts should hold that the subsequent holder undertook to be responsible for anything for which the shipper is not responsible under his bill of lading contract.

In this very case respondent Farr Sugar Corporation was an original shipper, and respondent, American Spirits, Inc., a subsequent holder (R. 73). It would be remarkable if the clause could be enforced against the latter, but not the former.

This very question has been discussed by leading English textwriters who reached the conclusion:

> "It seems clear, therefore, that this Rule protects any person claiming under the shipper no less than the shipper himself." Temperley's Carriage of Goods by Sea Act, 4th ed., pp. 64-65.

The petitioner's arguments on this point are repeated in the Brief for Respondent Belgian Overseas Transports, S. A., pages 36-38, but seem to require no further answer.[21] The argument that the Both-to-Blame clause relates solely to loss or damage suffered by the cargo or the ship "unrelated directly or indirectly to cargo damage" is supported by assertion only. Section 4(3) says loss or damage arising from "any cause".

Counsel for this same respondent also suggest in their brief at page 35 that an awkward situation would arise if the clause were held valid under the Harter Act but invalid under Section 4(3). This is not a legal argument and the suggestion need cause no concern. The Both-to-Blame clause has not been validated by either Act and the prohibition of Section 4(3) is merely confirmatory of that fact.

Actually Section 4(3) is merely a restatement of the basic principle of Anglo-Saxon law that "a cargo owner is not responsible to his carrier or to others for loss or damage caused by his cargo [or otherwise] except where there has been some dereliction of duty on his part". (Brief for Belgian Overseas Transports, S. A., p. 38.)

That principle is violated by the Both-to-Blame clause.

---

[21] See specific Comment on Brief for Respondent Belgian Overseas Transport, S. A., following at p. 45.

CONCLUSION.

The decision of the Court of Appeals that the Both-to-Blame clause is invalid and unenforceable is correct and the order of that Court should be affirmed.

Respectfully submitted,

LEONARD J. MATTESON,
Counsel for Respondents,
Farr Sugar Corporation and
American Spirits, Inc.

BIGHAM, ENGLAR, JONES & HOUSTON,
OSCAR R. HOUSTON,
RICHARD F. SHAW,
JULIAN S. GRAVELY, JR.,
Of Counsel.

COMMENT ON BRIEF FOR RESPONDENT BELGIAN OVERSEAS TRANSPORT, S. A., OWNER OF M. V. "ESSO BELGIUM".

The owner of the "Esso Belgium" has no interest in this case in the issue here presented and is not properly a respondent on the writ granted herein. The liability of the "Esso Beligium" for 100% of the cargo damage is conceded (pp. 1-2) and it is further conceded that that liability will remain even though the Both-to-Blame clause should be upheld (p. 2).

Counsel for this respondent, nevertheless, assert the right to file their brief in support of the Both-to-Blame clause and the position of the petitioner. Their brief was served on counsel for these respondents, without prior notice or consent on Saturday, February 23rd.

Notwithstanding the fact that the brief period remaining before the argument has not permitted counsel for these respondents to prepare a detailed reply, we, nevertheless, welcome this brief for its additional exposure of some of the fallacies which appear to us to exist in the arguments in support of the Both-to-Blame clause. We have at points in our principal brief referred to some of the parallels between the arguments presented by this respondent and the arguments for the petitioner. We shall confine our further comments to two principal features of this brief.

(a) *The Brief for the "Esso Belgium" makes it abundantly clear that the objective of the Both-to-Blame clause is to obtain for shipowners the substantial equivalent of the limitation of cargo rights obtained in foreign countries through the Brussels Collision Convention.*

This was frankly conceded in the courts below (R. 139), but is only hinted at in petitioner's brief (p. 11 and fn. 4).

The argument for this respondent begins by asserting that the United States is the only maritime nation which permits an innocent cargo owner to recover his damages in full from a negligent non-carrier when the carrier is also at fault (p. 2). The reason for this we have shown to be that the principle of thus restricting the rights of innocent persons, as embodied in the English rule of *The Milan*, Lush. Adm. 388, was rejected by this Court in *The Atlas*, 93 U. S. 302, 314-317, *supra*, pp. 36-37, and, as embodied in the Brussels Collision Convention, 1910, has not been approved in the United States because of the opposition of passengers and labor unions (Esso Belgium Brf. 26, fn. 10), as well as of cargo interests, and the great body of admiralty lawyers of this country as represented by the Maritime Law Association of the United States (R. 139).

The brief then refers to page 23 thereof where the efforts to secure ratification of the Convention are referred to. Regardless of the quoted views expressed, the fact is that ratification was opposed and prevented and the Convention finally withdrawn from further consideration.

At page 25 the purpose and effect of the Both-to-Blame clause to accomplish for the shipowners what had failed of accomplishment through the Brussels Convention is clearly stated. Actually it would seem that the determined effort to secure ratification in 1937-8 was in recognition of the fact that the Carriage of Goods by Sea Act, 1936, had not validated the clause. If it had, ratification would have been unimportant. Failing ratification or domestic legislation, the "only recourse" of the shipowners to obtain their objective of limiting the innocent cargo owner's rights, it is stated, is "to seek relief by contractual provision" (Esso Belgium Brf. 27).

Thus lies exposed the assumption by the shipowners of

the right to be legislators, an assumption which we submit was correctly rejected by the Court of Appeals (R. 139).

(b) *The assertion that a carrier may contract "as he pleases with a cargo owner, provided the essential duties owed to the cargo owner by the carrier are not reduced by the contract" is clearly fallacious.*

The above assertion is made in the brief for the owner of the "Esso Belgium", page 15. Statements to substantially the same effect are made at pages 4-5, 6, 16 and 22. This is the essence of the argument in that brief. Note that the emphasis is on the shipowner's pleasure, not the cargo owner's.

At page 4, counsel for the "Esso Belgium" set forth in the form of a syllogism what they characterize as "the fundamental error below". This syllogism quite obviously does not fairly represent the reasoning of the Court of Appeals which rested on much deeper foundations than those for which it is given credit. The argument of counsel for the "Esso Belgium" is, however, quite readily reducible to the form of a syllogism as follows:

Any clause which does not diminish the essential duties which the carrying vessel owes to the shipper is valid.

The Both-to-Blame clause does not diminish the essential duties which the carrying vessel owes to the shipper.

Therefore, the Both-to-Blame clause is valid.

This counsel's conception of the essential duties of the carrier to the cargo owner in a collision case is that they are nil, since the carrier has been relieved of liability to the cargo owner for faults and errors in navigation (pp. 7, 31, 32). Therefore, the argument is that since the carrier has no liability to the cargo owner in a collision case, the carrier may impose on the cargo owner whatever contract he pleases.

This produces the absurd result that in a collision case the shipowner by a similarly drawn clause could require the cargo owner to indemnify the carrier against his entire liability to the non-carrying vessel, and even to pay for the physical damage suffered by his own vessel. He could also obviously require the cargo owner to agree that the cargo owner would not enforce any claim for collision damage against any other ship or owner. How much further he could go would only be limited by the shipowner's imagination.

Clearly the major premise of the shipowner's argument is unsound. Any contract imposed by the shipowner must not only be free from the charge of lessening the carrier's essential duties of its employment but it must also be just and reasonable. We submit that no clause can be considered reasonable which demands an indemnity against the carrier's tort liability to another vessel owner or demands that the innocent cargo owner pay over to the negligent shipowner a substantial part of the proceeds of the cargo owner's unquestioned right of recovery against a negligent non-carrier.

Counsel's argument would prove too much, but it is only by such over-statement of the principles involved that all the arguments in support of the Both-to-Blame clause are made.

In a footnote on page 5, two texts are cited for the proposition that textwriters agree that the Both-to-Blame clause is valid. No such opinions are entitled to more weight than the reasoning which supports them, and these two authors at least are subject to the suspicion of bias. It should be noted that the treatise of Mr. Deutsch, as explained in the introduction to his book, was prepared for the account and benefit of his client, Waterman Steamship Corporation. Mr. Knauth is a former associate of Charles S. Haight, who, in 1938, as paid counsel for foreign steamship companies and their P. and I. underwriters, attempted unsuccessfully to promote the Brussels Convention, 1910, before the Senate Committee. Mr.

Knauth was associated with Mr. Haight in that ill-fated venture and testified at the Committee Hearings.[22]

We shall not attempt to comment further on other features of this brief.

Respectfully submitted,

LEONARD J. MATTESON,
Counsel for Respondents,
Farr Sugar Corporation and
American Spirits, Inc.

BIGHAM, ENGLAR, JONES & HOUSTON,
OSCAR R. HOUSTON,
RICHARD F. SHAW,
JULIAN S. GRAVELY, JR.,
Of Counsel.

---

[22] See Report of Hearings on Brussels Convention, 1910, Before a Subcommittee of the Committee on Foreign Relations, United States Senate, 75th Cong., 3d Sess., January, 1938, pp. 111-113, 158-159.

APPENDIX.

Harter Act, 1893.

THE HARTER ACT

27 U. S. Statutes at Large, 445. 46 U. S. Code, Sec. 190-195
[Feb. 13, 1893.]

Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect. 46 U. S. Code, Sec. 190.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided. 46 U. S. Code, Sec. 191.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner, or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agent or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the

thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service. 46 U. S. Code, Sec. 192.

Sec. 4. It shall be the duty of the owner or owners, master, or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be prima facie evidence of the receipt of the merchandise therein described. 46 U. S. Code, Sec. 193.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by such violation and the remainder to the Government of the United States. 46 U. S. Code, Sec. 194.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two, and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals. 46 U. S. Code, Sec. 195.

Carriage of Goods by Sea Act, 1936.

AN ACT

Relating to the carriage of goods by sea.

49 Stat. c. 229, 1207.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this Act: 46 U. S. Code, §1300.

Title I

Section 1. When used in this Act—

(a) The term "carrier" includes the owner or the charterer who enters into a contract of carriage with a shipper.

(b) The term "contract of carriage" applies only to contracts of carriage covered by a bill of lading or any similar document of title, insofar as such document relates to the carriage of goods by sea, including any bill of lading or any similar document as aforesaid issued under or pursuant to a charter party from the moment at which such bill of lading or similar document of title regulates the relations between a carrier and a holder of the same.

(c) The term "goods" includes goods, wares, merchandise, and articles of every kind whatsoever, except live animals and cargo which by the contract of carriage is stated as being carried on deck and is so carried.

(d) The term "ship" means any vessel used for the carriage of goods by sea.

(e) The term "carriage of goods" covers the period from the time when the goods are loaded on to the time when they are discharged from the ship. 46 U. S. Code, §1301.

Risks

Sec. 2. Subject to the provisions of section 6, under every contract of carriage of goods by sea, the carrier in relation to the loading, handling, stowage, carriage, custody, care, and discharge of such goods, shall be subject to the responsibilities and liabilities and entitled to the rights and immunities hereinafter set forth. 46 U. S. Code, §1302.

Responsibilities and Liabilities

Sec. 3. (1) The carrier shall be bound, before and at the beginning of the voyage to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

(3) After receiving the goods into his charge the carrier, or the master or agent of the carrier, shall, on demand of the shipper, issue to the shipper a bill of lading showing among other things—

(a) The leading marks necessary for identification of the goods as the same are furnished in writing by the shipper before the loading of such goods starts, provided such marks are stamped or otherwise shown clearly upon the goods if uncovered, or on the cases or coverings in which such goods are contained, in such a manner as should ordinarily remain legible until the end of the voyage.

(b) Either the number of packages or pieces, or the quantity or weight, as the case may be, as furnished in writing by the shipper.

(c) The apparent order and condition of the goods: PROVIDED, That no carrier, master, or agent of the carrier, shall be bound to state or show in the bill of lading any marks, number, quantity, or weight which he has reasonable ground for suspecting not accurately to represent the goods actually received, or which he has had no reasonable means of checking.

(4) Such a bill of lading shall be prima facie evidence of the receipt by the carrier of the goods as therein described in accordance with paragraphs (3) (a), (b), and (c), of this section: PROVIDED, That nothing in this Act shall be construed as repealing or limiting the application of any part of the Act, as amended, entitled "An Act relating to bills of lading in interstate and foreign commerce", approved August 29, 1916 (U. S. C., Title 49, secs. 81-124), commonly known as the "Pomerene Bills of Lading Act."

(5) The shipper shall be deemed to have guaranteed to the carrier the accuracy at the time of shipment of the marks, number, quantity, and weight, as furnished by him; and the shipper shall indemnify the carrier against all loss, damages, and expenses arising or resulting from inaccuracies in such particulars. The right of the carrier to such indemnity shall in no way limit his responsibility and liability under the contract of carriage to any person other than the shipper.

(6) Unless notice of loss or damage and the general nature of such loss or damage be given in writing to the carrier or his agent at the port of discharge before or at the time of the removal of the goods into the custody of the person entitled to delivery thereof under the contract of carriage, such removal shall be prima facie evidence of the delivery by the carrier of the goods as described in the bill of lading. If the loss or damage is not apparent, the notice must be given within three days of the delivery.

Said notice of loss or damage may be endorsed upon the receipt for the goods given by the person taking delivery thereof.

The notice in writing need not be given if the state of the goods has at the time of their receipt been the subject of joint survey or inspection.

In any event the carrier and the ship shall be discharged from all liability in respect of loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods should have been delivered: PROVIDED, That if a notice of loss or damage, either apparent or concealed, is not given as provided for in this section, that fact shall not affect or prejudice the right of the shipper to bring suit within one year after the delivery of the goods or the date when the goods should have been delivered.

In the case of any actual or apprehended loss or damage the carrier and the receiver shall give all reasonable facilities to each other for inspecting and tallying the goods.

(7) After the goods are loaded the bill of lading to be issued by the carrier, master, or agent of the carrier to the shipper shall, if the shipper so demands, be a "shipped" bill of lading: PROVIDED, That if the shipper shall have previously taken up any document of title to such goods, he shall surrender the same as against the issue of the "shipped" bill of lading, but at the option of the carrier such document of title may be noted at the port of shipment by the carrier, master, or agent with the name or names of the ship or ships upon which the goods have been shipped and the date or dates of shipment, and when so noted the same shall for the purpose of this section be deemed to constitute a "shipped" bill of lading.

(8) Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability otherwise than as provided in this Act, shall be null and void and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability. 46 U. S. Code, §1303.

Rights and Immunities

Sec. 4. (1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 3. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other person claiming exemption under this section.

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(c) Perils, dangers, and accidents of the sea or other navigable waters;

(d) Act of God;

(e) Act of war;

(f) Act of public enemies;

(g) Arrest or restraint of princes, rulers, or people, or seizure under legal process;

(h) Quarantine restrictions;

(i) Act or omission of the shipper or owner of the goods, his agent or representatives;

(j) Strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general: PROVIDED, That nothing herein contained shall

be construed to relieve a carrier from responsibility for the carrier's own acts;

(k) Riots and civil commotions;

(l) Savings or attempting to save life or property at sea;

(m) Wastage in bulk or weight or any other loss or damage arising from inherent defect, quality, or vice of the goods;

(n) Insufficiency of packing;

(o) Insufficiency or inadequacy of marks;

(p) Latent defects not discoverable by due diligence; and

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

(3) The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

(4) Any deviation in saving or attempting to save life or property at sea, or any reasonable deviation shall not be deemed to be an infringement or breach of this Act or of the contract of carriage, and the carrier shall not be liable for any loss or damage resulting therefrom: PROVIDED, HOWEVER, That if the deviation is for the purpose of loading or unloading cargo or passengers it shall, prima facie, be regarded as unreasonable.

(5) Neither the carrier nor the ship shall in any event be or become liable for any loss or damage to or in connection with the transportation of goods in an amount exceeding $500 per package lawful money of the United States, or in case of goods not shipped in packages, per

customary freight unit, or the equivalent of that sum in other currency, unless the nature and value of such goods have been declared by the shipper before shipment and inserted in the bill of lading. This declaration, if embodied in the bill of lading, shall be prima facie evidence, but shall not be conclusive on the carrier.

By agreement between the carrier, master, or agent of the carrier, and the shipper another maximum amount than that mentioned in this paragraph may be fixed: PROVIDED, That such maximum shall not be less than the figure above named. In no event shall the carrier be liable for more than th amount of damage actually sustained.

Neither the carrier nor the ship shall be responsible in any event for loss or damage to or in connection with the transportation of the goods if the nature or value thereof has been knowingly and fraudulently misstated by the shipper in the bill of lading.

(6) Goods of an inflammable, explosive, or dangerous nature to the shipment whereof the carrier, master, or agent of the carrier, has not consented with knowledge of their nature and character, may at any time before discharge be landed at any place or destroyed or rendered innocuous by the carrier without compensation, and the shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment. If any such goods shipped with such knowledge and consent shall become a danger to the ship or cargo, they may in like manner be landed at any place, or destroyed or rendered innocuous by the carrier without liability on the part of the carrier except to general average, if any. 46 U. S. Code, §1304.

Surrender of Rights and Immunities and Increase of Responsibilities and Liabilities

Sec. 5. A carrier shall be at liberty to surrender in whole or in part all or any of his rights and immunities or to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper.

The provisions of this Act shall not be applicable to charter parties; but if bills of lading are issued in the case of a ship under a charter party, they shall comply with the terms of this Act. Nothing in this Act shall be held to prevent the insertion in a bill of lading of any lawful provision regarding general average. 46 U. S. Code, §1305.

Special Conditions

Sec. 6. Notwithstanding the provisions of the preceding sections, a carrier, master or agent of the carrier, and a shipper shall, in regard to any particular goods be at liberty to enter into any agreement in any terms as to the responsibility and liability of the carrier for such goods, and as to the rights and immunities of the carrier in respect of such goods, or his obligations as to seaworthiness (so far as the stipulation regarding seaworthiness is not contrary to public policy), or the care or diligence of his servants or agents in regard to the loading, handling, stowage, carriage, custody, care, and discharge of the goods carried by sea: PROVIDED, That in this case no bill of lading has been or shall be issued and that the terms agreed shall be embodied in a receipt which shall be a nonnegotiable document and shall be marked as such.

Any agreement so entered into shall have full legal effect: PROVIDED, That this section shall not apply to ordinary commercial shipments made in the ordinary course of trade but only to other shipments where the character or condition of the property to be carried or the circumstances, terms, and conditions under which the carriage is to be performed are such as reasonably to justify a special agreement. 46 U. S. Code, §1306.

Sec. 7. Nothing contained in this Act shall prevent a carrier or a shipper from entering into any agreement, stipulation, condition, reservation, or exemption as to the responsibility and liability of the carrier or the ship for the loss or damage to or in connection with the custody and care and handling of goods prior to the loading on and subsequent to the discharge from the ship on which the goods are carried by sea. 46 U. S. Code, §1307.

Sec. 8. The provisions of this Act shall not affect the rights and obligations of the carrier under the provisions of the Shipping Act, 1916, or under the provisions of sections 4281 to 4289, inclusive, of the Revised Statutes of the United States, or of any amendments thereto; or under the provisions of any other enactment for the time being in force relating to the limitation of the liability of the owners of seagoing vessels. 46 U. S. Code, §1308.

Title II

Section 9. Nothing contained in this Act shall be construed as permitting a common carrier by water to discriminate between competing shippers similarly placed in time and circumstances, either (a) with respect to their right to demand and receive bills of lading subject to the provisions of this Act; or (b) when issuing such bills of lading, either in the surrender of any of the carrier's rights and immunities or in the increase of any of the carrier's responsibilities and liabilities pursuant to section 5, title I, of this Act; or (c) in any other way prohibited by the Shipping Act, 1916, as amended. 46 U. S. Code, §1309.

Sec. 10. Section 25 of the Interstate Commerce Act is hereby amended by adding the following proviso at the end of paragraph 4 thereof: "Provided, however, That insofar as any bill of lading authorized hereunder relates to the carriage of goods by sea, such bill of lading shall be subject to the provisions of the Carriage of Goods by Sea Act." Repealed by Transportation Act, 1940, 54 Stat. 929.

Sec. 11. Where under the customs of any trade the weight of any bulk cargo inserted in the bill of lading is a weight ascertained or accepted by a third party other than the carrier or the shipper, and the fact that the weight is so ascertained or accepted is stated in the bill of lading, then, notwithstanding anything in this Act, the bill of lading shall not be deemed to be prima facie evidence against the carrier of the receipt of goods of the weight so inserted in the bill of lading, and the accuracy thereof at the time of shipment shall not be deemed to have been guaranteed by the shipper. 46 U. S. Code, §1310.

Sec. 12. Nothing in this Act shall be construed as superseding any part of the Act entitled "An Act relating to navigation of vessels, bills of lading, and to certain obligations, duties, and rights in connection with the carriage of property", approved February 13, 1893, or of any other law which would be applicable in the absence of this Act, insofar as they relate to the duties, responsibilities, and liabilities of the ship or carrier prior to the time when the goods are loaded, on or after the time they are discharged from the ship. 46 U. S. Code, §1311.

Sec. 13. This Act shall apply to all contracts for carriage of goods by sea to or from ports of the United States in foreign trade. As used in this Act the term "United States" includes its districts, territories and possessions: PROVIDED, HOWEVER, That the Philippine Legislature may by law exclude its application to transportation to or from ports of the Philippine Islands. The term "foreign trade" means the transportation of goods between the ports of the United States and ports of foreign countries. Nothing in this Act shall be held to apply to contracts for carriage of goods by sea between any port of the United States or its possessions, and any other port of the United States or its possessions: PROVIDED, HOWEVER, That any bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea between such ports, containing an express statement that it shall be subject to the provisions of this Act, shall be subjected hereto as fully as if subject hereto by the express provisions of this Act: PROVIDED, FURTHER, that every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea from ports of the United States, in foreign trade, shall contain a statement that it shall have effect subject to the provisions of this Act. 46 U. S. Code, §1312.

Sec. 14. Upon the certification of the Secretary of Commerce that the foreign commerce of the United States in its competition with that of foreign nations is prejudiced by the provisions, or any of them, of title I of this Act, or by the laws of any foreign country or countries relating to the carriage of goods by sea, the President of the United States may, from time to time, by proclama-

tion, suspend any or all provisions of title I of this Act for such periods of time or indefinitely as may be designated in the proclamation. The President may at any time rescind such suspension of title I hereof, and any provisions thereof which may have been suspended shall thereby be reinstated and again apply to contracts thereafter made for the carriage of goods by sea. Any proclamation of suspension or rescission of any such suspension shall take effect on a date named therein, which date shall be not less than ten days from the issue of the proclamation.

Any contract for the carriage of goods by sea, subject to the provisions of this Act, effective during any period when title I hereof, or any part thereof, is suspended, shall be subject to all provisions of law now or hereafter applicable to that part of title I which may have thus been suspended. 46 U. S. Code, §1313.

Sec. 15. This Act shall take effect ninety days after the date of its approval; but nothing in this Act shall apply during a period not to exceed one year following its approval to any contract for the carriage of goods by sea, made before the date on which this Act is approved, nor to any bill of lading or similar document of title issued, whether before or after such date of approval in pursuance of any such contract as aforesaid. 46 U. S. Code, §1314.

Sec. 16. This Act may be cited as the "Carriage of Goods by Sea Act." 46 U. S. Code, §1315.

Approved, April 16, 1936.

Excerpt from Report of Hearing Before the Committee on Commerce, United States Senate, 74th Congress, 1st Session, on S. 1152, A Bill Relating to Carriage of Goods by Sea, May 10, 1935, pp. 51-59.

STATEMENT OF D. ROGER ENGLAR, NEW YORK CITY

Mr. ENGLAR. Mr. Chairman, my name is D. Roger Englar, lawyer, of the firm of Bigham, Englar, Jones & Houston, 99 John Street, New York City, appearing for the American Institute of Marine Underwriters.

I dislike very much to be the first to introduce a discordant note in this harmonious situation.

The CHAIRMAN. That is the reason you are standing up.

Mr. ENGLAR. Yes; and as a matter of fact I am accustomed to standing up when I speak, and I don't mind it.

The CHAIRMAN. We rather like it, because the witnesses do not take so long when they stand up.

Mr. ENGLAR. That is another advantage.

The American Institute of Marine Underwriters is composed of practically all of the marine insurance companies who do business in this country. They insure, I should say, the majority of the cargo going to and from this country by sea, and they are, therefore, one of the parties very vitally interested in the conditions of carriage, and the responsibility of steamship companies, because if its goods are not carried and delivered the members of this institute are the ones who are called upon to pay for it.

They have, from the beginning of the history of these rules, supported them. They have been represented here at all of the hearings. On the original White bill, I think, down to the 1930 conference of the Chamber of Commerce, and was parties to that agreement to which Colonel Barber has referred.

The only thing that has modified their position is this, that within the past few months the leading steamship companies, or at least members of some of the leading steamship conferences have announced their intention of inserting in their bills of lading a clause which the underwriters consider very, very objectionable.

The CHAIRMAN. What is that clause?

Mr. ENGLAR. If I may, I will just hand you a copy of it,

which I will ask be read into the record, and it is as follows:

> If the shipowner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this bill of lading will indemnify the shipowner against all liability to the other ship or her owners insofar as such liability represents loss, damage, or claim of said cargo paid or payable by the other ship or her owners to the said cargo owners and set off, recouped or recovered by the other ship or her owners as part of their claim against the carrying ship or shipowner.

That is what is known as the "both-to-blame collision" clause.

The CHAIRMAN. I would like to ask you this question: You are familiar with the British limitation of liability.

Mr. ENGLAR. I am; yes.

The CHAIRMAN. Does this bill go beyond that?

Mr. ENGLAR. This bill does not affect that at all. It expressly provides that these rules as set forth in this statement shall not affect the law as to limitation of shipowners' liability, and that whole field is left out of this law. This is a law designed solely to regulate what can be put in the bill of lading. In other words, it is a sort of statutory bill of lading, but does not affect the general law as to limitation of shipowners' liability.

What we object to in this clause, this so-called "both-to-blame collision" clause, is that it is a clause under which the owner of the cargo is required to indemnify the shipowner against the shipowners' liability to a third party for the negligence of his servants.

We must say that is beyond any clause we had in mind in agreeing to this legislation and to the League* rules. We think undoubtedly if that clause had been suggested

---

* Should read "Hague".

when the rules were originally drawn it would have been expressly prohibited.

Owing to the fact it has only been introduced lately, of course the rules make no provision for it.

The introduction of that clause threw the membership of the institute which I represent into a position of some uncertainty.

Prior to that, the membership of the institute, consisting of hundreds of insurance companies, had been unanimous in supporting this legislation, but since the introduction of that clause by the shipowners, that unanimity in the ranks of the association no longer exists, and therefore I was instructed to introduce a suggested amendment of the rules. It was made very clear to me that unless that were suggested, some of the members of the institute would come down here independently of the institute and would want to be heard on this issue.

I was able to accomplish this much yesterday. In conference with the various members of the institute, I took the position that we suggest this amendment which we think is a desirable and proper amendment, but that we further take the position we do not wish to be the ones who prevent the adoption of this constructive legislation, and if it develops that this suggested amendment is the only obstacle in the way of this legislation, we do not oppose the rule, nor do we oppose the legislation.

I make that statement so that if, as has been suggested here, you have complete harmony and I am the only man out of step, I have the authority to say we will not oppose the rules even if this amendment is not adopted.

The CHAIRMAN. Will you please make very clear for the record what is the suggestion if the law is enacted as proposed; and then afterward tell us what it is will be changed if we should accept your proposed amendment.

Mr. ENGLAR. I will be glad to do that. I have prepared a very brief and concise statement of the situation to submit to you.

The CHAIRMAN. Does it cover that situation?

Mr. ENGLAR. It does, and I would like to put that in the record, because it is clearly stated, and then I will be glad to further discuss it as much as the committee desires.

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

The CHAIRMAN. That statement may be inserted in the record.

(The statement of Mr. Englar referred to is as follows:)

I appear on behalf of the American Institute of Marine Underwriters.

The institute includes in its membership almost all of the companies engaged in writing marine insurance in this country. Its members are, therefore, directly and vitally interested in matters affecting the responsibility of ocean carriers of goods entrusted to such carriers for transportation. More than 10 years ago the institute carefully considered the Hague Rules and adopted a resolution approving the rules subject to a few necessary amendments. The institute has consistently adhered to that position and has maintained at all times a special committee charged with the duty of supporting the rules and endeavoring to bring about legislation to put the rules into effect in this country.

During the last few months, however, a new situation has arisen owing to the adoption by certain steamship lines of a bill-of-lading clause which the institute considers highly objectionable. One of the important steamship conferences has recently announced that all of its members propose to insert this clause in their bills of lading.

The clause, which is commonly referred to as the "both-to-blame collision" clause, reads as follows:

"If the shipowner shall have exercised due diligence to make the ship seaworthy and properly manned, equipped, and supplied, it is hereby agreed that in the event of the ship coming into collision with another ship as a result of the negligent navigation of both ships, the owners of the cargo carried under this bill of lading will indemnify the shipowner against all liability to the other ship or her owners insofar as such liability represents loss, damage, or claim of said cargo paid or payable by the other ship or her owners to the said cargo owners and set off, recouped, or recovered by the other ship or her owners as part

of their claim against the carrying ship or shipowner."

The clause requires the owner of the cargo to indemnify the shipowner against the shipowner's liability to a third party for the negligence of the shipowner's servants. Naturally, this clause is highly objectionable to the owners and underwriters of cargo, and they would not accept any code or set of rules under which such a clause was permissible.

A careful study of the above bill has satisfied the institute that the clause above quoted is prohibited by section 4 (3) of the bill, which reads as follows:

"The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

The institute, therefore, supports the bill, but suggests that section 4 (3) be amended to read as follows:

The shipper *or owner of the goods* shall not be responsible for loss or damage sustained, *or liability therefore incurred*, by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants. *Any cause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner or cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.* (New matter italicized.)

In support of the suggested amendment I am instructed to point out that the principal argument in favor of this legislation has been that, if it is enacted, it will no longer be necessary to make a detailed study of the voluminous provisions of ocean bills of lading, which now include hundreds of lines of small print. The argument has been that anything in the bill of lading which purported to modify the respective rights and liabilities of cargo and carrier, as set forth in the statute, would be invalid. That this is the in-

tent of the statute appears from section 3 (8), which reads as follows:

"Any clause, covenant, or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or in connection with the goods, arising from negligence, fault, or failure in the duties and obligations provided in this section, or lessening such liability *otherwise than as provided in this act, shall* be null and void, and of no effect. A benefit of insurance in favor of the carrier, or similar clause, shall be deemed to be a clause relieving the carrier from liability."

The institute, therefore, considers that if it were permissible to use the so-called "Both-to-blame collision" clause, after the adoption of the statute, the intent and, indeed, the whole purpose of the statute would be defeated.

Under these circumstances it will naturally be argued that, if the statute in its present form is clear, no amendment is necessary. Our answer to this argument is that the objectionable clause has only recently been introduced, and it must be anticipated that the carriers will make a determined effort to sustain it. Its validity will undoubtedly be the subject of protracted litigation. The purpose of the rules is to avoid such litigation, and if the objectionable clause has been introduced at the time the Hague rules were formulated, it would undoubtedly have been prohibited by express reference. This was done in the case of a far less objectionable clause, i. e., "The benefit-of-insurance clause," which is specifically referred to in section 3 (8).

The institute, therefore, urges the amendment of 4 (3) above quoted, and, if this amendment is not adopted, the Institute desires specifically to reserve the privilege of urging appropriate legislation dealing expressly with the objectionable "Both-to-blame collision" clause.

The CHAIRMAN. This matter of limitation of liability is a very pertinent one to the American people, as is shown

by the recent disaster of the *Mohawk* and the *Morro Castle.*

It was rather shocking to find that under the American laws as they exist today, speaking about personal damages first, the only recourse the survivors have is the value of the hull, whatever is left after the fire, and the amount of freight which was paid on that cargo. That was a very small amount in the case of the *Morro Castle*, and if I remember it was not more than $50,000.

Mr. ENGLAR. That is approximately so, and it was also very small in the case of the *Titanic.*

The CHAIRMAN. Yes; and so far as loss or damage to persons from loss of life, I am sure Congress will insist on a material change to the existing law. So far as our subcommittee is concerned on the investigation of the *Morro Castle* and the *Mohawk* we have given no consideration to the question of damage or loss of cargo, and that is the thing you have in mind now, is it not?

Mr. ENGLAR. Yes; that is.

The CHAIRMAN. If I remember correctly, in the British laws there is a provision of £8 per ton.

Mr. ENGLAR. £8 per ton for loss of life and £7 per ton for cargo losses, and the cargo cannot share in the £8, but the loss of life, if not satisfied out of the £8, can come in and prorate also in the £7.

The CHAIRMAN. What would happen if we would accept your amendment?

Mr. ENGLAR. My amendment, sir, would have no bearing on that at all, because the shipowner would still have his right to limit liability. If his ship were lost this would not impose any liability on him and would not touch that at all. In fact, this does not touch the present law as it exists. It deals entirely with the bills of lading, and simply says that the shipowner cannot put in the bill of lading a provision that the cargo owner shall be liable to the shipowner for loss or damage sustained. It simply prevents that clause being put in the contract.

The CHAIRMAN. So far as the shipper is concerned, if your amendment were adopted it would go back to the liability of the owner of the ship.

Mr ENGLAR. It would not affect his present liability

at all, but would simply prevent him from taking his present liability and saddling it back on us.

The CHAIRMAN. Does the shipowner not insure his ship for that?

Mr. ENGLAR. I am not speaking of hull insurance, because these people I represent are insurers of cargo.

The CHAIRMAN. That is the only recourse he has?

Mr. ENGLAR. The shipowner of course has insurance, and that would be covered by what we call the "P. and I." insurance, protection and indemnity insurance.

The CHAIRMAN. That is separate and apart from this.

Mr. ENGLAR. Yes, sir; entirely separate and apart.

You will often hear it said that these shippers are already insured, and it does not matter, but that is not an accurate statement. I admit most of them have insurance, but a great many of them are not fully insured.

In other words, there are various grades of insurance, some of them are insured only against total loss, and they have not anything like complete insurance, so that the shipper has a very real interest in this.

I attended this meeting this morning at the chamber of commerce which has been discussed by these gentlemen who have spoken, and I think their position is they do not agree with me as to the importance of this, but their position is it does not affect us under the Hague rules, and it can be taken care of separately. They urged me not to be the one to prevent the otherwise complete agreement, and I yielded to them. I do not say we oppose these rules if the amendment is not adopted, but I do say I think the rules in their present form, and that the bill 1152 in its present form, does not [specifically]* invalidate this objectionable clause, and I do not think they will ever be finally settled short of the Supreme Court, and I do not myself see any use in adopting rules then having years of litigation to determine the meaning of sections 3 and 4.

Therefore, as long as this clause has come up, my suggestion here is that we deal with it specifically; but

---

* Word "specifically" obviously omitted from text by inadvertence. *Cf.* 6th line following, and purport of prepared statement, *supra*, p. 31.

if that will be the final straw which prevents the adoption of the law, I will waive it.

I want to say to you, Mr. Chairman, since you have indicated you are here rather in the capacity of a recorder or observer, if this matter is not taken care of in the bill 1152, I want it understood we reserve the privilege of coming around to your committee in other connections and urging relief from that clause.

It does not have to be done under the Hague rules I can see, but I do not want it understood we accept the Hague rules as final disposition of our rights. We would like to have it taken care of, and if it cannot be taken care of here, we will not go on record as opposing the rules.

The CHAIRMAN. As this is written, on page 8, line 15, it says, "The shipper shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants."

Mr. ENGLAR. Mr. Chairman, that, in my opinion, ought to say, "shipper or owner of goods." The shipper very often is a mere nominee without interest in the goods after they are shipped, and you will notice in other sections we speak of the carrier and the ship, and it seems to me when they say shipper, they should say shipper or owner of the goods in the interest of clarifying the clause.

The CHAIRMAN. So that the shipper or owner of the goods would not be responsible for loss or damage arising or resulting from any cause as provided on page 8, and you want to add to that?

Mr. ENGLAR. I put in there loss or damage sustained, or liability thereon incurred.

The CHAIRMAN. Then you want further to include:

> Any clause or stipulation which seeks to impose liability contrary to the foregoing shall be null and void, including any clause or stipulation requiring the owner of cargo to indemnify the ship or carrier against liability to a colliding vessel for any part of the collision damages paid or payable by such colliding vessel.

That is what you propose.

Mr. ENGLAR. Yes; although I think even without that last sentence the two previous amendments would very much clarify the clause.

Senator GIBSON. The insurance companies included within the organization you represent are writers of what kind of insurance?

Mr. ENGLAR. Cargo underwriters.

Senator GIBSON. Only cargo underwriters?

Mr. ENGLAR. Yes; of course, they insure in other branches and do various kinds of business; but this institute I represent has nothing to do with that. I think I may say the bulk of their business is cargo business, and that is what the institute deals with.

The CHAIRMAN. There is a lot of foreign capital involved in this institute, is there not?

Mr. ENGLAR. It is not an organization that has any capital.

The CHAIRMAN. I mean you have companies in your organization that are not American companies.

Mr. ENGLAR. Yes; there are foreign companies in there; in other words, all of the foreign companies that do business in our country are in there, but a great majority of the membership is American.

The CHAIRMAN. Is most of the underwriting taken over by foreign companies?

Mr. ENGLAR. Not by any means.

The CHAIRMAN. What proportion would you say, offhand?

Mr. ENGLAR. You are speaking, I suppose, of foreign companies who are admitted to do business in this country, because they are the ones who are members of the institute.

The CHAIRMAN. That is what I mean.

Mr. ENGLAR. I should say their total business in this field might be 20 percent or 25 percent of the total, but that is a pure guess, you understand.

The CHAIRMAN. Would the same proportion hold as regards insurance of the ship?

Mr. ENGLAR. Well, as to that, there is a specific provision. You see, that hull insurance is controlled by the

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

American Marine Insurance Syndicate, which we formed at the suggestion of the Shipping Board back in 1923, and they have a specific provision in their constitution that the foreign companies cannot have more than a fixed proportion, which I think is one-third. The constitution of the institute provides their interest cannot be more than one-third of the total, but I do not think it has reached that proportion so far.

Senator GIBSON. The chairman has referred to the *Morro Castle*. What was the cargo insurance on that boat?

Mr. ENGLAR. It was partly insured with the American companies, and, of course, it is very difficult to separate that from the foreign companies.

Senator GIBSON. I am not asking you to separate them, but what was the gross cargo insurance carried on that vessel?

Mr. ENGLAR. I have forgotten what the values were there, but my recollection is it was two or three hundred thousand dollars. Perhaps Mr. Chester, who is here, could tell you.

Mr. CHESTER. My recollection is it was about one half of a million dollars, but I think a great deal of the cargo was transshipment cargo from abroad with the insurance issued in Germany, England, and other places.

Mr. ENGLAR. When I said two or three hundred thousand dollars, I had in mind what I think was the loss to the American insurance companies. As Mr. Chester says, goods that came here from abroad and were transshipped on the *Morro Castle* were in many cases insured at the point of origin, and that would carry through to Cuba.

Senator GIBSON. What I was really interested in was, did the insurance companies of America make any independent investigation as to the cause of the disaster.

Mr. ENGLAR. Yes; they did.

Senator GIBSON. Did they come to any definite conclusion?

Mr. ENGLAR. I do not think they did. Our firm made the investigation for them, and we are not prepared to announce any definite conclusion.

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

The CHAIRMAN. How much of an investigation did you make?

Mr. ENGLAR. We made a very elaborate investigation. One of my partners went on board the ship, when she was aground, with engineers and experts, and went over their plans and discussed it with many witnesses. We made a very elaborate investigation.

The CHAIRMAN. Are you willing to turn that over to this committee of ours?

Mr. ENGLAR. Most assuredly.

The CHAIRMAN. Have you been asked for it yet?

Mr. ENGLAR. No, sir.

The CHAIRMAN. We have a special committee of the Senate investigating that, and we want all of the information we can have. We have not lost any time, because we have been going over the Steamboat Inspection Service, and we hope to have before long the minutes of the grand jury in this case; and, as I understand, you made an independent investigation.

Mr. ENGLAR. Yes; we did.

The CHAIRMAN. You say you reached no definite conclusion?

Mr. ENGLAR. We have not reached any definite conclusion. Of course, you understand when I speak of a conclusion I am speaking of something we can establish in court, and that means you must have definite evidence.

The CHAIRMAN. You have some moral conclusions?

Mr. ENGLAR. Yes; we have very conclusive moral conclusions.

The CHAIRMAN. Will you prepare yourself to give that to us?

Mr. ENGLAR. I will be glad, sir. I do not know that I, individually, would be the one to give it to you, because I did not personally make the investigation, but the individuals who have the information will be glad to attend at the convenience of your committee.

Senator GIBSON. Did you make a similar investigation with respect to the *Mohawk*?

Mr. ENGLAR. Yes, sir; we did.

Senator GIBSON. Did you arrive at any conclusions?

Mr. ENGLAR. We arrived at some very definite conclusions in that case.

Excerpt from Report of Hearing Before the Committee on Commerce, etc.

The CHAIRMAN. That is under investigation, too, and I would appreciate it very much if you will leave with the clerk of this committee the names of the persons we can call to get this information, because we must have it.

Mr. ENGLAR. I will be glad to write that in to you. I will have to get the names after I return and look into it.

Mr. BARBER. Mr. Chairman, may I make one statement in behalf of the conference?

The CHAIRMAN. Certainly, Colonel Barber.

Mr. BARBER. I would like to say on behalf of the conference held this morning that after discussion of the matters referred to by Mr. Englar the conference asked me to state to the committee here that the conference recommends that the amendment be not made as part of the present legislation.

The CHAIRMAN. Mr. Englar has been very generous about that.

Mr. BARBER. I think if you want an explanation from the other side, from a legal point of view, perhaps we would ask Mr. Walter to explain to you why we did not want it to be made a part of this legislation.

The CHAIRMAN. We would be glad to have you do that.

Mr. BARBER. Mr. Walter, will you please make an explanation of this to the committee?

Mr. WALTER. You will notice, page 4 of the bill and the succeeding pages over to page 10 deals with rights and immunities.

Paragraph 1 of section 4, on page 6, says that neither the carrier nor the ship shall be liable for certain things.

Paragraph 2 of the same section says neither the carrier nor the ship shall be responsible for loss or damage resulting from specific items included in subparagraph (a) to subparagraph (p).

Then, paragraph 3 says the ship shall not be responsible for loss or damage sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect of the shipper, his agents, or his servants.

A clause has been recently incorporated in some bills of lading, to which Mr. Englar referred, which does violate provision 3 of the section referred to, and therefore could

not be enforced, because the very enacting clause—lines 3 to 6 at the beginning of the act—say:

> That every bill of lading or similar document of title which is evidence of a contract for the carriage of goods by sea to or from ports of the United States, in foreign trade, shall have effect subject to the provisions of this act.

Therefore, where a bill of lading goes beyond and conflicts with this paragraph 3 of section 4, I think, with the exception of Mr. Englar's suggestion of the word "owner", it cannot be enforced so far as the shipper is concerned.

The CHAIRMAN. Are you willing to have inserted in line 15 after the word "shipper", as Mr. Englar has suggested, the words "or owners of goods"?

Mr. WALTER. Yes; I would be willing to have that inserted, but I would not want to do it if there is anybody who would object to the word "owner." If there is no objection, I would like to have everybody stand up and say so or forever hereafter hold his peace.

Mr. KEATING. I object.

The CHAIRMAN. However, Mr. Walter, you want it as is.

Mr. WALTER. Yes; I want it as is, and Mr. Keating for the shipowners wants it as is.

Of course there is one other thing I would call to your attention, when they talk about getting rid of litigation, you must not overlook the fact that lawyers have to live.

The CHAIRMAN. My observation is that lawyers do.

Is there anything further you want to say, Mr. Walter?

Mr. WALTER. No, Mr. Chairman.

The CHAIRMAN. We will now hear from Mr. Keating.